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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC., PETITIONER,

vs.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1953
CERTIORARI GRANTED JUNE 8, 1953

SUPREME COURT OF THE UNITED STATE

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC., PETITIONE

vs.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONE MRS. VIOLA CAMPBELL, VELMAR LEE CAM BELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEA FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14055

AVONDALE MARINE WAYS, INC., Appellant,

versus

JOSEPH H. HENDERSON, Deputy Commissioner, et al., Appellees.

No. 14056

AVONDALE MARINE WAYS, INC., Appellant,

versus

JOSEPH H. HENDERSON, Deputy Commissioner, et al., Appellees.

JOINT STIPULATION & ORDER TO CONSOLIDATE THIS CASE NO. 14,056 FOR PURPOSE OF BRIEFING & HEARING, BUT THAT A SEPARATE JUDGMENT BE ENTERED IN EACH RECORD.—Filed May 9, 1952.

Since the above cases present the same questions of law and similar questions of fact, and since they were consolidated for hearing before the United States District [fol. 2] Court and were disposed of by the District Court in one opinion, it is stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that with the permission of this Honorable Court, which is hereby prayed for, the above numbered and entitled two cases shall be consolidated for briefing and hearing in this Court, and that the record in only one case, that of Avondale Marine Ways, Inc. vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055, shall be printed; and it is further agreed that separate judgments be rendered in each of the above numbered and entitled two cases based upon the Court's find-

ings of fact as applied to each case and the law applicable thereto.

Thus Done and Signed in Duplicate at New Orleans, this 25th day of April, 1952, A. D.

John W. Sims, Counsel for Avondale Marine Ways, Inc., Appellant, G. Harrison Scott, Counsel for Joseph H. Henderson, Deputy Commissioner, et al., Appellees.

ORDER—May 9, 1952

It Is Ordered By The Court, that the above-numbered and entitled two causes be consolidated for briefing and hearing; that the record in only one cause, that of Avondale Marine Ways, Inc. vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055, shall be printed; and that separate judgments be rendered [fol. 3] in each of the above-numbered and entitled two causes based upon the findings of fact as applicable in each of these respective causes and the law applicable thereto.

Wayne G. Borah, Judge, United States Circuit Court of Appeals for the Fifth Circuit.

May 9th, 1952.

[Caption omitted]

[fol. 4] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

COMPLAINT FOR INJUNCTION—Filed January 11, 1952

The complaint of Avondale Marine Ways, Inc., respectfully alleges that:

I

Plaintiff is a corporation organized and existing under the laws of the State of Louisiana, authorized to do and doing business in the State of Louisiana, having its principal place of business in the City of New Orleans, State of Louisiana.

II

This complaint is filed for the purpose of reviewing and setting aside as not in accordance with the law or the evidence, the order, findings of fact and awards of defendant Joseph H. Henderson, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Seventh Compensation District, dated December 14, 1951, directing plaintiff to pay to the other defendants herein the benefits on account of the death of Arthur Campbell in amounts provided in the Longshoremen's and Harbor Workers' Compensation Act, as amended.

III

All defendants, Mrs. Viola Campbell, Velmar Lee Camp-
[fol. 5] bell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster Campbell, and Brenda Joyce Campbell, reside within the jurisdiction of this proceeding is vested in this Honorable Court by Section 21 (B) of the Longshoremen's and Harbor Workers' Compensation Act, as amended (U.S.C.A., Title 33, Section 921 (B)).

IV

As will appear from the copy of the proceedings at the hearing held before Joseph H. Henderson on Wednesday, November 28, 1951, at Room 813, Masonic Temple Building, New Orleans, Louisiana, at 9:30 A. M., a copy of which proceedings is attached hereto and made a part hereof and marked Plaintiff Exhibit "A", the decedent, Arthur Campbell, was killed on July 20, 1951 in an explosion while working in the employ of plaintiff on a marine railway operated by plaintiff.

V

Thereafter, the said Joseph H. Henderson, Deputy Commissioner, over plaintiffs' objection, made a compensation order, findings and awards of compensation in which he awarded compensation to his co-defendants herein under the Longshoremen's and Harbor Workers' Compensation Act, a true copy of which compensation order, findings and

awards is attached hereto and made a part hereof and marked Plaintiff Exhibit "B".

VI

In and by said compensation order and awards, the said [fol. 6] Deputy Commissioner found that at the time the said Arthur Campbell received the injuries resulting in his death, he was employed by plaintiff and engaged with other employees in cleaning the inside of a barge, which barge was on the cradle of a marine railway of the plaintiff, "the cradle being on wheels which were on the rails (tracks) of the marine railway, and the rails being attached to cross timbers and said timbers resting upon the ground, * * *."

VII

The Longshoremen's and Harbor Workers' Compensation Act provides in Section 3 thereof (Title 33 U.S.C.A., Section 903) that:

"(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. * * *"

VIII

The Louisiana Workmen's Compensation Act (R. S. 23:1035) provides, in part, as follows:

"The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

[fol. 7] The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, * * *"

IX

As will clearly appear from Plaintiff Exhibits "A" and "B" annexed hereto, the death of the insured did not occur upon the navigable waters of the United States (including any drydock), but occurred in the course of employment on land and is within the said Louisiana Workmen's Compensation Act.

X

As will further appear from the provisions of the Louisiana Workmen's Compensation Act hereinabove quoted, valid provision is made by the State law for compensation to the survivors of the said Arthur Campbell and, in fact, plaintiff has been and is at the present time making voluntary compensation payments under the State act to defendants, Mrs. Viola Campbell, Velmar Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster Campbell and Brenda Joyce Campbell, survivors of Arthur Campbell, in accordance with the provisions of the Louisiana Workmen's Compensation Law.

XI

Plaintiff avers, therefore, that the compensation order and awards so made by the defendant, Joseph H. Hender-
[fol. 8] son, Deputy Commissioner, are not in accordance with the law and the evidence and are invalid for the reason that the accident involved did not take place upon the navigable waters of the United States (including any drydock), but occurred on land and that the Deputy Commissioner was, therefore, without jurisdiction or authority to make or render any compensation order or awards.

XII

Plaintiff has no adequate remedy at law herein and has no means of obtaining redress of the wrong complained of except through injunction proceedings, mandatory or otherwise, to annul and set aside the compensation order and awards of compensation complained of herein.

Wherefore, plaintiff respectfully prays that:

(a) A mandatory injunction be granted by and issued from this Honorable Court to said defendant, Joseph H. Henderson, Deputy Commissioner, ordering and directing him to recall and set aside his awards, compensation order and findings of fact of December 14, 1951, and to render an order denying the claim of defendants, Mrs. Viola Campbell, Velmar Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster Campbell and Brenda Joyce Campbell, and each of them, for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act.

(b) Plaintiff have judgment that said awards and order of December 14, 1951 be annulled and set aside;

[fol. 9] (c) Plaintiff have and obtain such other orders, decrees and relief as equity, law and the nature of the case may require.

(S.) Ashton Phelps, Tenth Floor United Fruit Building, New Orleans, Louisiana. (S.) John W. Sims, Tenth Floor United Fruit Building, New Orleans, Louisiana.

Of Counsel: Mendes & Mount, 27 William Street, New York 5, New York. Phelps, Dunbar, Marks & Claverie, Tenth Floor United Fruit Building, New Orleans 12, Louisiana.

[fol. 10] EXHIBIT TO COMPLAINT

COMPENSATION ORDER, AWARD OF COMPENSATION

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
SEVENTH COMPENSATION DISTRICT

Case No. 434-178

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

MRS. VIOLA CAMPBELL, (WIDOW) VELMAR LEE CAMPBELL, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster Campbell, Brenda Joyce Campbell, (Minor children), Claimants, (Arthur Campbell, deceased employee),

against

AVONDALE MARINE WAYS, INC., Employer, Self-Insurer.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and
A hearing having been duly held in conformity with law,
The Deputy Commissioner makes the following

Findings of Fact:

1. That on the 20th day of July, 1951, Arthur Campbell, hereinafter called the decedent, was in the employ of the employer above named, at the place known as Avondale [fol. 11] (near New Orleans, Louisiana), in the State of Louisiana, in the Seventh Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by itself as a self-insurer; that on said day the decedent herein, while performing service for the employer upon a marine railway, sustained accidental injury arising out of and in the course of his employment and resulting in his disability and death while he was employed as a laborer

on a barge known as the "Walter Buss", said barge being then on the employer's marine railway which extended from shore into the waters of the Mississippi River, at the establishment of said employer, at the place known as Avondale (near New Orleans, Louisiana), in the State of Louisiana, when, while cleaning inside a tank of said barge while the barge was on the cradle of the marine railway, the cradle being on wheels which were on the rails (tracks) of the marine railway, and the rails being attached to cross timbers and said timbers resting upon the ground, and the marine railway extending down into the waters of said River, a flash explosion occurred in the tank in which the decedent was cleaning, resulting in the decedent being severely burned and caused his (instant) death;

2. That the death of the decedent occurred on July 20, 1951, as a result of said injury;

3. That written notice of said injury and death was not given within thirty days but that the employer had immediate knowledge of said injury and death and that the employer has not been prejudiced by such failure to give such written notice;

[fol. 12] 4. That the average weekly wage of the decedent, at the time of his injury (on July 20, 1951), amounted to the sum of $52.50 per week; that full wages were paid for the day of injury (death occurred same day);

5. That the total amount of the funeral expenses for preparation and burial of the body of the decedent, which was handled by Young's Mortuary Service, Inc., 1029 Jackson Avenue, New Orleans, Louisiana, amounted to the sum of $400.00 which amount has been paid in full to said Young's Mortuary Service, Inc., by Avondale Marine Ways, Inc.; that the reasonable amount of funeral expenses for which said employer is liable is the sum of $400.00 (maximum under the said Act, as amended), and the funeral expenses for which said employer is liable is approved by the Deputy Commissioner in the sum of $400.00;

6. That Mrs. Viola Campbell, one of the claimants herein, whose present address is Box 41, Killona, Louisiana, was born September 25, 1915, and is the surviving wife of the decedent and was living with and dependent for support upon him at the time of his injury and death, and is entitled to a death benefit of $18.38 per week (35% of $52.50, maxi-

mum average weekly wage—Section 9 (b) and (e) of the said Act as amended by the Amendment to said Act of June 24, 1948), beginning as of date July 21, 1951;

7. That death benefits have accrued to the said Mrs. Viola Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $367.60;

[fol. 13] 8. That Velmar Lee Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born October 19, 1934, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

9. That death benefits have accrued to the said Velmar Lee Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

10. That Thelma Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born July 28, 1936, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

11. That death benefits have accrued to the said Thelma Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

12. That Rona May Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born May 6, 1938, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

13. That death benefits have accrued to the said Rona May Campbell during the period July 21, 1951 to December [fol. 14] 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

14. That Arthur Campbell, Jr., one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born November 27, 1939, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

15. That death benefits have accrued to the said Arthur Campbell, Jr., during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

16. That Roger Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born February 16, 1942, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

17. That death benefits have accrued to the said Roger Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

18. That Clarence Rundles Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born November 26, 1944, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

[fol. 15] 19. That death benefits have accrued to the said Clarence Rundles Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

20. That Edna Ann Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana was born August 16, 1946 and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

21. That death benefits have accrued to the said Edna Ann Campbell during the period July 21, 1951 to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

22. That Lionel Foster Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born August 27, 1948, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of date July 21, 1951;

23. That death benefits have accrued to the said Lionel Foster Campbell during the period July 21, 1951 to De-

cember 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

24. That Brenda Joyce Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born April 17, 1950, and is a surviving child of the decedent, and is entitled to a death benefit of $1.84666 per week (3.5185% of $52.50), beginning as of [fol. 16] date July 21, 1951;

25. That death benefits have accrued to the said Brenda Joyce Campbell during the period July 21, 1951, to December 7, 1951, inclusive, a period of 20 weeks, in the sum of $36.9332;

26. That the employer, self-insurer, named above has paid $540.00 as death benefits to and on behalf of the claimants above named under the Louisiana Workmen's Compensation Act, and credit for said payment is allowed on the award of compensation made herein; that the said employer has also paid $400.00 on the funeral expenses which is the maximum amount allowed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act under the Amendment to said Act of June 24, 1948;

27. That it is the judgment of the Deputy Commissioner that the compensation (death benefits) awarded herein to the minor children named above shall be paid direct to their mother, Mrs. Viola Campbell, as natural guardian of said children, to be used by her for the support of said children (equally to each child), and disbursed in her discretion for such purpose, subject to the further order of the Deputy Commissioner if used otherwise.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

[fol. 17] Award:

That the employer, Avondale Marine Ways, Inc., Avondale, Louisiana (P.O. Box 1030, New Orleans 8, Louisiana), shall pay funeral expenses and death benefits as follows:

The sum of $400.00 as funeral expenses, however, as said amount, as funeral expenses, has already been paid, there is now nothing remaining to be paid by said employer on said expenses, and the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as Amended,

with respect to the funeral expenses in this case, have been satisfied;

That said employer shall pay to Mrs. Viola Campbell, surviving wife of the decedent, for and on her behalf and to her for and on behalf of the minor children Velmar Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster Campbell and Brenda Joyce Campbell, the sum of $700.00, forthwith, for 20 weeks death benefits that have accrued to each of them during the period July 21, 1951 to December 7, 1951, inclusive, less the sum of $540.00 already heretofore paid, and

Beginning December 8, 1951, shall continue to pay death benefits to the said Mrs. Viola Campbell for herself individually and to her for and on behalf of the minor children Velma Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionel Foster [fol. 18] Campbell, and Brenda Joyce Campbell, as mother and natural guardian of said children, fortnightly, at the rate of $35.00 per week ($70.00 each two weeks).

The Awards for death benefits made herein to the claimants above named are subject to the applicable limitations of Sections 2 (14) and 9 (b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended by the Amendment to said Act of June 24, 1948.

Given under my hand at New Orleans, Louisiana, this 14th day of December, 1951.

Jos. H. Henderson, Deputy Commissioner, Seventh Compensation District.

JHH/d

IN UNITED STATES DISTRICT COURT.

MOTION TO CONSOLIDATE—Filed February 12, 1952

On motion of Joseph H. Henderson, Deputy Commissioner, United States Department of Labor, Bureau of Employees Compensation, Seventh District, through his counsel, G. Harrison Scott, Assistant United States Attorney for the Eastern District of Louisiana, and on suggesting to this Honorable Court that the two above-

captioned causes should be consolidated as these two causes [fol. 19] involve common questions of law and fact:

It is ordered that the foregoing causes be consolidated as these two causes involve common questions of law and fact.

New Orleans, Louisiana, February 12, 1952.

(S.) J. Skelly Wright, United States District Judge.

(S.) G. Harrison Scott, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed February 12, 1952

On motion of Joseph H. Henderson, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, Seventh District, through G. Harrison Scott, Assistant United States Attorney for the Eastern District of Louisiana, and on suggesting to this Honorable Court that defendant Joseph H. Henderson was made a party to these proceedings together with defendants herein, as a result of his order and findings of fact, dated December 14, 1951, directing plaintiff to pay to the other defendants herein the benefits accruing unto them under the Longshoremen's and Harbor Workers' Compensation Act, as amended, as a result of the injuries and deaths sustained by Arthur Campbell and Joseph D'Arensbourg;

[fol. 20] And on suggesting to this Honorable Court that a hearing was held by the said Joseph H. Henderson, Deputy Commissioner, on Wednesday, November 28, 1951, at 9:30 A.M., in the matter involving Viola Campbell, et al., Claimants, vs. Avondale Marine Ways, Inc., Employer and Self-Insurer, at which time the parties interested therein, whose names appear in the transcript of said testimony taken thereon, a transcript of which is attached hereto and made a part hereof, together with the exhibits marked Claimant 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and defendants D-1, D-2, D-3, which said exhibits are attached to the aforementioned transcript and made a part hereof;

And on suggesting to this Honorable Court that a hearing was held by the said Joseph H. Henderson, Deputy

Commissioner, on Tuesday, November 27, 1951, at 9:30 A.M., in the matter involving Enese Coleman D'Arensbourg, et al., Claimants, vs. Avondale Marine Ways, Inc., Employer and Self-Insurer, at which time the parties interested therein, whose names appear in the transcript of said testimony taken thereon, a transcript of which is attached hereto and made a part hereof, together with the exhibits marked Claimants A, B, C, D, E, and Defendants D-1, D-2, D-3;

And on suggesting to this Honorable Court that the aforementioned award by the Deputy Commissioner for the Seventh Compensation District is disputed and controverted solely on the grounds that the decedents aforementioned met injury and death while working on a barge on a marine railway, which said railway does not come within the purview of the Longshoremen's and Harbor Workers' Com-
[fol. 21] pensation Act, Section 3 thereof, Title 37 USCA, Section 903, which is as follows:

"(a) Compensation shall be payable under this chapter in respect to disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by said law * * *"

but rather that said injuries and deaths come within the scope and purview of the Louisiana Workmen's Compensation Act (L.S.A.R.S. 23: 1035), which reads in part as follows:

"The provisions of this chapter shall also apply to every person performing services arising at and incidental to his employment in the course of his employer's trade, business or occupation in the following hazardous trades, businesses and occupations:

The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, * * *"

And on suggesting to this Honorable Court that the sole and only dispute with the Deputy Commissioner's award

is based upon plaintiff's contention that "the death of the insured did not occur upon the navigable waters of the United States (including any dry dock), but occurred in the course of employment on land and is within the said Louisiana Compensation Act."

[fol. 22] And on suggesting to this Honorable Court that this issue has been ruled on specifically and categorically in favor of the Deputy Commissioner in the Circuit Court of Appeals, Fifth Circuit, case of Continental Casualty Company v. Lawson, 64 F. (2) 802, and also in the case of Maryland Casualty Company, et al., v. Lawson, Deputy Commissioner, Fifth Circuit, 64 F. (2) 802, in which the Court said:

"Technically, a dry dock is a watertight basin which after pumping out allows examination and work upon the bottom of a vessel. A graving dock, except for details of construction, is the same. A floating dock receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. A marine railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle runs below the water and receives a vessel which is then hauled out. Bradford, Glossary of Sea Terms, "Dry Dock," Railway."

"(3) In enacting the Longshoremen's and Harbor Workers' Compensation Act it was clearly the intention of Congress to give the same rights and remedies to those employed in work of a maritime nature as are enjoyed by other workers under the provisions of state workmen's compensation acts. The act is to be liberally construed to effect its purpose. Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U. S. 408, 409, 52 S. Ct. 187, 76 L. Ed. 366.

"(4,5) In construing the act we are not bound by technical definitions but must interpret it by giving to the [fol. 23] words used their ordinary meaning. Courts of admiralty may take notice of terms in general use in maritime affairs. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200. In nautical parlance "dry dock," --floating dock" and "marine railway" are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly

the same purposes, i.e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat. A ship's master speaks of "dry docking" his vessel regardless of which method is to be used. That the words have a common meaning is illustrated by this case. Although operating a marine railway, appellant calls itself a dry dock.

"There are few dry docks, technically considered, in the United States. Floating docks or marine railways or both are to be found at every seaport. It must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks. We entertain no doubt that intending the law to cover "any dry Dock" Congress intended to include marine railways. Cf. International Stevedoring Co. v. Harverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, and Warner v. Foltra, 293 U. S. 155, 55 S. Ct. 46, 79 L. Ed. 254.

"We do not find the authorities relied upon by appellants persuasive and prefer to adhere to our former ruling in Continental Casualty Co. v. Lawson, supra."

[fol. 24] Defendant moves this Honorable Court for a summary judgment in favor of defendant, Joseph H. Henderson, Deputy Commissioner, and against plaintiff, Avondale Marine Ways, Inc., dismissing its claim.

(S.) G. Harrison Scott, Assistant United States Attorney, Attorney for Defendant, 237 Post Office Building, New Orleans, Louisiana.

Notice of Motion and Certificate of Service omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

EXHIBIT "B" TO COMPLAINT

Official Report of Proceedings Before Joseph H. Henderson, Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation.

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Case No. 434-178

Viola Campbell (Widow), et al., claimant,

vs.

Avondale Marine Ways, Inc., employer, self-insurer

Place: New Orleans, Louisiana,
Date: November 28, 1951.

U. S. Department of Labor
Bureau of Employees' Compensation

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

[fol. 26] Case No. 434-178

Viola Campbell (Widow), and Velmar Lee, Thelma, Rona May, Arthur, Roger, Clarence Rundles, Edna Ann, Lionell Foster and Brenda Joyce Campbell (minor children) claimants,

vs.

Avondale Marine Ways, Inc., employer and self-insurer Room 813, Masonic Temple Building, New Orleans, Louisiana.

Wednesday, November 28, 1951.
Met, pursuant to notice, at 9:30 a.m.

Before: Joseph H. Henderson, deputy commissioner of the Seventh Compensation District.

Appearances:

For the Claimant:

Viola Campbell, Killona, Louisiana.

For the Defendant:

Mendes & Mount, 27 William Street, New York, and Phelps Dunbar Marks & Claverie (By John W. Sims).

PROCEEDINGS

The Deputy Commissioner:

Gentlemen, shall we get started, please?

[fol. 27] The hearing at this time scheduled to begin at 9:30 o'clock this morning, November 28, 1951, in Room 813, of the Masonic Temple Building, at 333 St. Charles Street, New Orleans, Louisiana, is in connection with a claim for compensation (death benefits) filed by Viola Campbell, for and on behalf of herself, and by her for and on behalf of nine minor children, and against Avondale Marine Ways, Incorporated, employer, self-insurer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

We have been waiting for Viola Campbell, the widow in this case, to show up, and she has just shown up at this moment. We will, therefore, proceed with the hearing the best we can.

Viola Campbell is sitting at the hearing table this moment, and I desire to ask her if she has a lawyer or an attorney to represent her at this hearing here this morning.

Viola, do you have a lawyer or attorney to represent you here this morning?

The Claimant:

No, sir.

The Deputy Commissioner:

Are you willing for this hearing to proceed—

The Claimant:

Yes, sir.

[fol. 28] The Deputy Commissioner:

(Continuing) —to a conclusion without your having an attorney or lawyer to represent you?

The Claimant:

Yes.

The Deputy Commissioner:

I would also like to ask Viola whether or not she has any witnesses to testify in connection with her side of the case here this morning.

The Claimant:

No, sir.

The Deputy Commissioner:

Do you have any witnesses to testify in connection with your side of the case here today, Viola?

The Claimant:

No, sir.

The Deputy Commissioner:

I noticed a woman came in with you a moment ago.

The Claimant:

Yes, sir.

The Deputy Commissioner:

Who is that woman?

The Claimant:

My sister.

[fol. 29] The Deputy Commissioner:

Your sister?

The Claimant:

Yes.

The Deputy Commissioner:

I make the further observation that Mr. E. V. Moore, of Avondale Marine Ways, Incorporated, is present in the hearing room at this time, and that attorney John W. Sims is also present in this hearing room at this time, and that Mr. Sims is representing the Avondale Marine Ways, Incorporated, in this hearing here today.

For the record I'd like to ask Mr. Moore, who is connected with Avondale Marine Ways, Incorporated, if that is correct?

Mr. Moore:

Yes, sir, that is correct.

The Deputy Commissioner:

To briefly repeat again, this hearing at this time, which is in Room 813 of the Masonic Temple Building, at 333 St. Charles Street, New Orleans, Louisiana, is in connection with the claim for compensation (death benefits) filed by Viola Campbell, for and on behalf of herself, and by her for and on behalf of nine minor children, namely, Velmar Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Rogert Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionell Foster Campbell, and Brenda Joyce Campbell, as widow and minor children, respectively, of Arthur Campbell, Jr., the deceased em-[fol. 30] ployee, and against Avondale Marine Ways, Incorporated, employer, self-insurer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended.

The employer timely reported to the Deputy Commissioner that the employee, Arthur Campbell, Jr., was killed as a result of an explosion which occurred on drilling barge "Walter Russ," which was at that time on the marine railway of the employer, at the employer's establishment

at Avondale, Louisiana, and that said explosion, which resulted in this employee's death, occurred on July 20, 1951.

On August 30, 1951, a claim for compensation (death benefits) was filed with the Deputy Commissioner by Viola Campbell, for and on behalf of herself as widow of the deceased employee, and by her for and on behalf of nine minor children of the deceased employee, whose names were given on the claim as Velmar Lee Campbell, Thelma Campbell, Rona May Campbell, Arthur Campbell, Jr., Roger Campbell, Clarence Rundles Campbell, Edna Ann Campbell, Lionell Foster Campbell and Brenda Joyce Campbell. A copy of said claim was sent to the employer, self-insurer, by registered mail, for answer. The employer's answer was received, in which certain facts were admitted and denied.

It is requested that the interested parties or their representatives state for the record the facts which they admit and accept, without controversy, for purposes of this hearing, and also to state the issue or issues upon which they desire to be heard. Off the record.

[fol. 31] (Discussion off the record.)

The Deputy Commissioner:

On the record.

STATEMENT OF FACTS

Mr. Sims:

Mr. Commissioner, the employer, self-insurer, Avondale Marine Ways, Incorporated, admits and accepts the following statement of facts in this case without controversy:

1. That on the 20th day of July, 1951, Arthur Campbell, Jr., hereinafter called the decedent, was in the employ of Avondale Marine Ways, Incorporated, at a place known as Avondale, which is about eleven miles upstream of the Mississippi River from the City of New Orleans, Louisiana, in the State of Louisiana, in the Seventh Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said act was insured by itself as a self-insurer; that on said day the decedent herein while performing services for the employer sustained accidental injury as a result of a flash

explosion (cause unknown) arising out of and in the course of his employment as a laborer, and resulting in his disability and death;

2. That at the time of said explosion decedent was cleaning in a tank of the drill barge known as "Walter Russ," which barge was not owned by the employer. The said explosion occurred in said tank and seriously burned the decedent and caused his instant death;

[fol. 32] 3. That at the time of said explosion, accidental injury and death, the said barge "Walter Russ" was then on the cradle of a marine railway at the establishment of said employer, at a place known as Avondale, in the State of Louisiana, the said place of Avondale being about eleven miles upstream of the Mississippi River from the City of New Orleans, in the State of Louisiana; the said marine railway extended from the land on shore down into the water of the Mississippi River, and the cradle, which is on wheels, rests upon the tracks of the marine railway, and when a vessel is to be pulled from the water, the cradle on the marine railway is lowered into the water, and the vessel is floated onto and rests on the cradle. Several hours prior to said explosion, the barge "Walter Russ" was floated onto the cradle of the submerged tracks of the marine railway, and then said cradle, with the barge resting thereon, was then hauled out of the water and brought to rest on the marine railway above the ground on which it rested at a point some 400 feet from the water's edge, and it was there that the explosion on said barge occurred, which resulted in the death of the decedent; the decedent was inside the said tank at the time of the explosion.

4. That the death of the decedent occurred on July 20, 1951, as a result of said injury;

5. That wherein notice of said injury and death was not given within 30 days, that the employer had immediate knowledge of said injury and death, and that the employer had not been prejudiced by such failure to give such written notice;

[fol. 33] 6. That the employer, Avondale Marine Ways, Incorporated, is and has been prior to July 1951 a corporation organized and existing under and by virtue of the laws of the State of Louisiana. The employer has been and was

on July 20, 1951, engaged in the business of marine construction and repair at its plant located at the place known as Avondale, Louisiana, and the Parish of Jefferson, State of Louisiana, and in connection with its plant at the place of Avondale, Louisiana, it owned and operated a shipyard and the marine railway upon which the barge "Walter Russ" had been hauled ashore prior to the time of the aforementioned explosion and resulting injury and death. The Employer, Avondale Marine Ways, Incorporated, was, on July 20, 1951, an authorized self-insurer under the provisions of the Longshoremen's and Harbor Workers' Compensation Act;

7. That the average weekly wage of the decedent, at the time of his injury, amounted to the sum of $52.50 per week; that full wages were paid for the day of injury and death;

8. That the total amount of the funeral expenses for the preparation and burial of the body of the decedent, which was handled by Young's Mortuary Service, Incorporated, address 1028 Jackson Avenue, New Orleans, Louisiana, amounted to the sum of $400.00, and said amount has been paid in full to said Young's Mortuary Service, Incorporated, by Avondale Marine Ways, Incorporated;

9. That Mrs. Viola Campbell, one of the claimants herein, whose present address is Box 41, Killona, Louisiana, was born September 25, 1915, and is the surviving wife of the [fol. 34] decedent, and was living with and dependent upon for support, upon him at the time of his injury and death;

10. That Velmar Lee Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born October 19, 1934, and is a surviving child of the decedent;

11. That Thelma Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born July 28, 1936, and is a surviving child of the decedent;

12. That Rona May Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born May 6, 1938, and is a surviving child of the decedent;

13. That Arthur Campbell, Jr., one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at

Killona, Louisiana, was born November 27, 1939, and is a surviving child of the decedent;

14. That Roger Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born February 16, 1942, and is a surviving child of the decedent;

15. That Clarence Bundles Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born November 26, 1944, and is a surviving child of the decedent;

[fol. 35] 16. That Edna Ann Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born August 16, 1946, and is a surviving child of the decedent;

17. That Lionell Foster Campbell, one of the claimants herein, residing with his mother, Mrs. Viola Campbell, at Killona, Louisiana, was born August 27, 1948, and is a surviving child of the decedent;

18. That Brenda Joyce Campbell, one of the claimants herein, residing with her mother, Mrs. Viola Campbell, at Killona, Louisiana, was born April 17, 1950, and is a surviving child of the decedent;

19. That the employer, self-insurer named above, has paid $540.00 as death benefits to and on behalf of the claimants named herein, under the Louisiana Workmen's Compensation Act, such payments to be credited on any final award under the Longshoremen's and Harbor Workers' Compensation Act.

Mr. Commissioner, those are the facts which the employer, self-insurer, is willing to admit, and which said employer does now admit and accept without controversy in this case.

The Deputy Commissioner:

Mrs. Viola Campbell, you have read the statement of facts which Mr. Sims, Attorney Sims, for the Avondale Marine Ways, Incorporated, has stated into the record that the employer is willing to admit and accept without controversy, and which the employer does now admit and accept without controversy in your case.

[fol. 36] Did you clearly understand the facts which he read into the record a moment ago?

The Claimant:

Yes, sir.

The Deputy Commissioner:

Do you accept and admit those same enumerated facts without controversy on behalf of yourself and the nine minor children which he named?

The Claimant:

Yes, sir.

The Deputy Commissioner:

Excuse me. I have a long distance phone call. We'll take a ten-minute recess.

(Short recess.)

The Deputy Commissioner:

In connection with the claimant's side of the case, I would like to have in the record, as a matter of record, certified copy of this widow's marriage certificate, and certified copies of the birth certificates of each child. She has presented originals of those certificates, and I have had one of the ladies in my office make copies of them, and that lady that made the copies has certified them to be true and correct. If counsel for the defendant has no objections, I'd like to get those into the record just as a matter of record.

Mr. Sims:

No objection.

[fol. 37] The Deputy Commissioner:

Particularly as to the fact of marriage and particularly as to the children being children of the decedent, and the dates of their birth.

Mr. Sims:

No objection.

The Deputy Commissioner:

On behalf of Mrs. Viola Campbell, the widow in this case and the minor children previously referred to, there is of-

fered, introduced and filed into evidence at this time a copy of this widow's marriage certificate, showing her marriage to Arthur Campbell, Jr., on May 22, 1934, the said copy being certified by Grace L. Ryan, who is one of the employees of my office.

I also offer, introduce and file into evidence, on behalf of the same claimants, certified copy of the birth record of the child, Velmar Lee Campbell, which shows this child was born on October 19, 1934.

I also offer into evidence certified copy of the birth record of the child, Thelma Campbell, which shows that she was born on July 28, 1936.

I also offer, introduce and file into evidence on behalf of the said claimants, certified copy of the birth record of the child Rona May Campbell, which shows that she was born on May 6, 1938.

I also offer, introduce and file into evidence on behalf of these claimants, the birth record of the child Arthur Campbell, Jr., which shows that this child was born on November 27, 1939.

[fol. 38] I also offer, introduce and file into evidence, birth record of the child Roger Campbell, which shows this child was born on February 16, 1942.

I also offer, introduce and file into evidence, birth record of the child Clarence Rundles Campbell, which shows that this child was born on November 26, 1944.

I also offer, introduce and file into evidence, birth record of the child Edna Ann Campbell, which shows that this child was born August 16, 1946.

I also offer, introduce and file into evidence, the birth record of the child Lionell Foster Campbell, which shows that this child was born August 27, 1949.

I also offer, introduce and file into evidence on behalf of said claimants, the birth record of the child Brenda Joyce Campbell, which shows this child was born April 17, 1950.

The birth certificates of these children was reflected by the certified copies just offered, introduced and filed in evidence, shows that they are children of the decedent and of the widow in this case.

Mr. Sims, you have previously stated you have no objection to receiving these papers into evidence, is that correct?

Mr. Sims:

None whatsoever.

[fol. 39] The Deputy Commissioner:

The same are received into evidence, and the Court reporter is now authorized to identify the same in the order in which they were introduced as claimant's Exhibits 1 through 10, inclusive.

(The documents in question were received in evidence and were marked respectively Claimants' Exhibits 1 through 10, inclusive, and will be found attached to the back of the original transcript of the proceedings in this case.)

The Deputy Commissioner:

So far as I observe at the moment, Mr. Sims, that seems to be all the evidence that perhaps may be admitted by both sides into the record in this case without controversy.

Mr. Sims:

Off the record, Mr. Henderson?

The Deputy Commissioner:

Off the record.

(Discussion off the record.)

The Deputy Commissioner:

That being true, it will be in order at this time for counsel for the employer, Avondale Marine Ways, Incorporated, to state the issue or issues upon which he desires to be heard in this case.

Mr. Sims:

Avondale Marine Ways, Incorporated, denies that the circumstances under which the death of Arthur Campbell, [fol. 40] Jr., occurred conferred any jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, and Avondale Marine Ways, Incorporated, contends that the death is subject to compensation and jurisdiction under the Louisiana Workmen's Compensation Act.

The Deputy Commissioner:

Are those all the issues of the defendant, Mr. Sims?

Mr. Sims:

Yes.

The Deputy Commissioner:

It will next be in order for the widow in this case to state the issue or issues upon which she desires to be heard on her own behalf and on behalf of the nine minor children involved in this case. This widow is of the colored race and not being represented by counsel, I desire to tell at this point that I cannot represent her as her attorney in this hearing. I have to try the case and then render a decision, so I can't be her attorney.

The Claimant:

Yes, sir,

The Deputy Commissioner:

But I can assist her in any way that she makes it possible within the authority that I have under the law to see that evidence or witnesses that she may have to testify for and on her behalf, and on behalf of the children, are given an opportunity to present such evidence as they may have, or witnesses to testify as they may produce, and to advise her, [fol. 41] within the authority which I have under the Act of the procedure which is customarily followed in this kind of case. What she may desire to do with reference to admitting into evidence in this case here today any evidence that was developed in the hearing held yesterday in the case of Joseph D'Arensbourg, deceased employee of Avondale Marine Ways, Incorporated, whose death occurred under the same conditions and on the same date and at the same place as the death of Arthur Campbell, Jr., would be for the widow to determine. We all know that Mrs. Viola Campbell was not present at the hearing held in the D'Arensbourg case yesterday, and Mrs. Viola Campbell had no representative at the hearing yesterday in the D'Arensbourg case.

It was mentioned by counsel for the defendant in the hearing held yesterday in the D'Arensbourg case that the defendant would agree, and did agree, for the testimony of the witnesses Henry Z. Carter and Arthur A. Grant to be made a part of the record in this hearing here today without either of those gentlemen being present; both of those gentlemen stated yesterday that their testimony, as they gave it, equally applied to the D'Arensbourg case and the Arthur Campbell case.

The testimony that was given by those two gentlemen yesterday, of course, was stenographically reported by the official Court reporter, and we do not have at this time a transcription of those stenographic notes. Therefore, we do not have at the present time a typewritten copy of the testimony that was given by Mr. Carter and Mr. Grant. Therefore, I am not in a position at this time to show a [fol. 42] typewritten copy of the transcript of the testimony of those two gentlemen to Mrs. Viola Campbell, the widow in this hearing here today, for her to see and consider whether she is willing to admit their testimony in the case yesterday to become a part of the record in her case here today; neither am I in a position to tell her word for word the testimony given by Mr. Carter and Mr. Grant yesterday. About all that I can tell her would be that the testimony of those two gentlemen yesterday, in the D'Arensbourg case, did not in the least or in any way change the fact that the death of Joseph D'Arensbourg, and the death of Arthur Campbell, Jr., occurred in the tank of the barge "Walter Russ," and that the barge, at the time of the explosion and death of these two men, was then on the cradle of the marine railway, and the cradle was resting on the tracks of the marine railway, and the tracks were fastened or anchored to timbers, and the timbers rested upon the ground; all of which means that the death of both of these men occurred upon the marine railway. Now, that's about the only extent that I'm able to tell her with reference to the testimony of those two gentlemen yesterday.

Mr. Carter and Mr. Grant's testimony was with respect to the marine railway, its location, and the location of the barge on the marine railway, and its distance from the

water's edge at the time of the explosion which caused your husband's death. I'm now speaking to Mrs. Viola Campbell.

It also referred to the history of this marine railway, and the use to which it has been put, and the use to which it is being made in the course of the business of Avondale Marine Ways, Incorporated.

[fol. 43] Now, if Mrs. Viola Campbell desires to see the testimony of those two gentlemen, namely, Mr. Carter and Mr. Grant, as it will appear in the transcript of the testimony in the D'Arensbourg case before she makes up her mind or decides to admit the testimony of those two gentlemen in the record of her case here today, I will grant her that opportunity, which would mean that this hearing would have to be continued to a later time, at least until the official transcription of the hearing in the D'Arensbourg case yesterday has been delivered to the Deputy Commissioner by the Court reporter. Even after she should review the testimony of Mr. Carter and Mr. Grant in the D'Arensbourg case yesterday, if she should decline to admit their testimony into the record of her case here today without those gentlemen appearing and testifying over again, I would have to respect her wishes in that connection. If Mrs. Viola Campbell, from what I have told her here this morning, in the last few minutes, is willing for the testimony of Mr. Carter and Mr. Grant, as it will appear in the transcript of the testimony in the D'Arensbourg case, to become and be made a part of the record in Mrs. Viola Campbell's case here today, that will be agreeable with me.

The Claimant:

I have no objection.

The Deputy Commissioner:

I beg your pardon?

The Claimant:

I have no objection.

[fol. 44] The Deputy Commissioner:

You have no objections to what?

The Claimant:

For—if you want their claim to be, you know—what Mr. Carter—the testimony—

The Deputy Commissioner:

You mean, if I understand you correctly, Viola, you have no objections to the testimony given by Mr. Carter—

The Claimant:

Yes, sir.

The Deputy Commissioner:

(Continuing)—yesterday to be made a part of the record in your case here today?

The Claimant:

Yes, sir.

The Deputy Commissioner:

Is that what you mean?

The Claimant:

Yes, sir.

The Deputy Commissioner:

And if I also understand you correctly, you have no objections to the testimony of Mr. Grant, who testified yesterday in the D'Arensbourg case, to be made a part of the record in your hearing here today?

[fol. 45] The Claimant:

No, sir, I don't.

The Deputy Commissioner:

Is that correct?

The Claimant:

Yes.

The Deputy Commissioner:

Is that what you mean?

The Claimant:

Yes.

The Deputy Commissioner:

In other words, you have no objection to receiving into the record in your hearing here today the testimony of Mr. Grant and Mr. Carter as they gave it yesterday in the D'Arensbourg case?

The Claimant:

Yes.

The Deputy Commissioner:

Is that right?

The Claimant:

Yes, sir, that's what I mean.

The Deputy Commissioner:

You fully understand, Viola, that if you want to, you can refuse or decline to have the testimony of Mr. Carter and Mr. Grant go into the record of your case here today, until you have had a chance to read it, or after you have read it, [fol. 46]you can still refuse or decline to have it made a part of the record in your case here today unless they come down, those two gentlemen come down and testify over again here.

The Claimant:

I understand.

The Deputy Commissioner:

You understand?

The Claimant:

Yes, I understand what you mean.

The Deputy Commissioner:

You have that right to decline to accept their testimony yesterday—

The Claimant:

Yes.

The Deputy Commissioner:

(Continuing)—in your case here today, if you wish, but if you want to you can, as you have previously stated, you can state for the record, which this gentleman here, the Court reporter, is taking down everything that is being said—

The Claimant:

Yes.

The Deputy Commissioner:

You can state for the record, as you have done, I believe, that you are willing for the testimony of Mr. Carter and—that's Mr. Henry Z. Carter, whom, I believe he said he's the [fol. 47] general manager of Avondale Marine Ways—

The Claimant:

Yes, sir.

The Deputy Commissioner:

And Mr. Arthur A. Grant, who is not connected with Avondale Marine Ways, Incorporated, but who, if I recall correctly, is an expert, or in other words, a consultant—consulting engineer and marine surveyor.

They brought Mr. Grant in yesterday in the D'Arensbourg case primarily, if I remember correctly, to state more or less the history of this marine railway used at Avondale Marine Ways at the time of your husband's death, and how it compared with drydocks and how it is used; how the marine railway is used, and for what purpose it is used, and things like that.

The Claimant:

Yes.

The Deputy Commissioner:

As I have told you a moment ago, the testimony of those two gentlemen does not alter or change the fact that your husband's death occurred in the course of his work while cleaning a tank on the barge "Walter Russ", and the barge in which he was working at that time, that means the time of his injury and death, was on the marine railway. The employer, that is the Avondale Marine Ways is contending in this hearing here today, as they did in the D'Arensbourg [fol. 48] case, yesterday, that the injury and death of your husband, as well as of the husband in the D'Arensbourg case, was sustained under circumstances that, as they say, do not bring the injury and death under the Longshoremen's Act, which is the federal law, administered by me in the Seventh Compensation District; but they say, instead, it comes under the state compensation law. That is the primary issue or controversy in both cases. Do you understand?

The Claimant:

Yes, I understand.

The Deputy Commissioner:

Now, you filed a claim for yourself and on behalf of your children, who are the decedent's children—

The Claimant:

Yes.

The Deputy Commissioner:

Mrs. D'Arensbourg did the same thing in respect to herself and her children.

The Claimant:

Yes.

The Deputy Commissioner:

So the employer says we deny that it comes under the Longshoremen's Act, and when they made that denial, that made it necessary to hold a hearing in both cases—

[fol. 49] The Claimant:

Yes.

The Deputy Commissioner:

(Continuing) —in order for me to adjudicate one way or the other—

The Claimant:

Sure.

The Deputy Commissioner:

(Continuing) —the claims which you filed for yourself, and on behalf of your children, and the claims filed by the widow in the D'Arensbourg case on behalf of herself and her children. So we held the hearing in the D'Arensbourg case yesterday, and it was concluded. That hearing was finished yesterday.

The Claimant:

Yes.

The Deputy Commissioner:

So your case comes on for hearing today, and your husband, as I have previously stated, and the D'Arensbourg man, both lost their lives in the same place, at the same time, on the same date, on the same barge, on the same marine railway.

The Claimant:

Yes, sir.

The Deputy Commissioner:

So the testimony given by Mr. Carter and Mr. Grant yesterday, as I have previously told you, irrespective of

other things that they mentioned, does not change the fact [fol. 50] that your husband lost his life while working on the barge "Walter Russ", and the barge at that time was on the cradle of the marine railway, and the cradle was on the tracks of the marine railway, which means that your husband lost his life while working on a barge on the marine railway, and the marine railway on which he was working at that time extended from the land down into the water of the Mississippi River.

Their testimony doesn't change that fact at all.

So that's about the extent that I can tell you with reference to their testimony, the testimony of Mr. Carter and Mr. Grant yesterday. Other details, if you desire to know what they were, may be observed by you, or read by you in the transcript of their testimony as it will appear in the transcript of the testimony of the D'Arensbourg case.

Now, with the explanation that I have given you, I'll ask you again, in order to be sure that you understand what I have tried to explain to you, and understand what you wish to do in the matter, and that is: Are you willing, as you have indicated a moment ago, to have the testimony of Mr. Henry Z. Carter, as he gave it in the D'Arensbourg hearing yesterday made a part of the record in your case here today?

The Claimant:

Well, if it doesn't need to be in there, it's all right.

The Deputy Commissioner:

I can't answer that question. I've told you all that I can tell you. Now, you have previously stated you have no [fol. 51] objection to it, but I want you to thoroughly understand it.

The Claimant:

Yes, I understand.

The Deputy Commissioner:

Are you willing for it to be made a part of the record in your case here today?

The Claimant:

Yes, sir, it's all right.

The Deputy Commissioner:

I beg your pardon?

The Claimant:

Yes, sir, it's all right.

The Deputy Commissioner:

Now, are you willing for the testimony of Mr. Arthur A. Grant, as he gave it yesterday in the D'Arensbourg case, to be made a part of the record in your case here today?

The Claimant:

Yes, sir.

The Deputy Commissioner:

You have no objections to that?

The Claimant:

Yes, sir.

[fol. 52] The Deputy Commissioner:

You have no objection to Mr. Carter's testimony being made a part of the record in your hearing here today?

The Claimant:

Yes, sir.

The Deputy Commissioner:

Is that correct?

The Claimant:

Yes, sir.

The Deputy Commissioner:

Do you fully understand it now?

The Claimant:

Yes, I understand.

The Deputy Commissioner:

You have no objection?

The Claimant:

No objection.

The Deputy Commissioner:

All right.

I understood and do understand that counsel for the defendant yesterday also stated it was agreeable with the defendants for the testimony of Mr. Henry Z. Carter and Mr. Arthur A. Grant, as they gave it yesterday in the D'Arensbourg case, to be made a part of the record in Mrs. [fol. 53] Campbell's case here today, is that correct, Mr. Sims?

Mr. Sims:

That is correct, Mr. Commissioner, and I would like for you to take such steps as are necessary to make it a formal part of the record.

The Deputy Commissioner:

Off the record.

(Discussion off the record.)

The Deputy Commissioner:

On the record.

The following instructions are given to the present Court reporter, Mr. Edward D. Gilbert, of the firm of Vernon Polk & Associates, of New Orleans, Louisiana; Polk & Associates, or Mr. Vernon Polk himself, is the designated official Court reporter in New Orleans on these cases under the Longshoremen's Act, and that Mr. Gilbert is now authorized by the Deputy Commissioner and requested to insert and make a part of the transcript of the testimony of this hearing here today the testimony that was given by

Mr. Henry Z. Carter, and Mr. Arthur A. Grant, for the defendants in the case of Mrs. Enese Coleman D'Arensbourg, widow of Joseph D'Arensbourg, as the same appears in the transcribed notes of the Court reporter who took the hearing yesterday in the D'Arensbourg case.

At the beginning of the testimony of each of those gentlemen, the Court reporter is requested, and directed to make [fol. 54] this statement: "The following testimony of Mr. Henry Z. Carter is a verbatim statement of his testimony which he gave in the Joseph D'Arensbourg case yesterday, November 27, 1951, and is copied hereinbelow from the transcript of the testimony as prepared by the Court reporter who took the hearing in the D'Arensbourg case yesterday."

The present Court reporter will make the same statement immediately preceding the statement which he will make with reference to the testimony of Mr. Arthur A. Grant, who also testified in the D'Arensbourg case yesterday.

When the present Court reporter copies verbatim the testimony of Mr. Henry Z. Carter and Mr. Arthur A. Grant, as the same appears in the transcript of the testimony in the D'Arensbourg case, the testimony thus shown as having been given by Mr. Henry Z. Carter and Mr. Arthur A. Grant shall then become a part of the official record of this hearing here today in the case of Mrs. Viola Campbell and her minor children whose names have previously been stated at this hearing, and such testimony of Mr. Henry Z. Carter and Mr. Arthur A. Grant will then be considered by the Deputy Commissioner to the same extent as if those two gentlemen had been present and testified verbatim to the same extent as they testified yesterday.

Do you understand that, Viola?

The Claimant:

Yes.

[fol. 55] The Deputy Commissioner:

That is agreeable with you?

The Claimant:

Yes.

The Deputy Commissioner:

Is that satisfactory now the way I've stated it, Mr. Sims?

Mr. Sims:

Quite satisfactory, Mr. Commissioner. Yes, sir.

The Deputy Commissioner:

That then will eliminate the necessity of either Mr. Carter or Mr. Grant appearing at this hearing here today and re-testifying over again.

Mr. Sims:

Yes, sir.

(The following testimony of Mr. Henry Z. Carter is a verbatim statement of his testimony which he gave in the Joseph D'Arensbourg case yesterday, November 27, 1951, and is copied hereinbelow from the transcript of the testimony as prepared by the Court reporter who took the hearing in the D'Arensbourg case yesterday:)

[fol. 56] "Henry Z. Carter, was called as a witness for and on behalf of the defendant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and, upon examination, testified as follows:

Examination by the Deputy Commissioner.

By the Deputy Commissioner:

Q. For the record will you state your full name, please?
A. Henry Z. Carter.
Q. And your address?
A. 1215 Pine Street, New Orleans, Louisiana.
Q. Your age?
A. Forty-four.
Q. Your present position, or state with whom you are now employed and in what capacity?
A. I am employed by Avondale Marine Ways, Incorporated, as general manager.

Q. And did you occupy the same position with Avondale Marine Ways, Incorporated, at the time of the decedent's death in this case, which was on July 20, 1951?

A. I did.

The Deputy Commissioner:

Proceed, Mr. Sims.

Direct Examination.

By Mr. Sims:

Q. How long have you been employed as general manager of Avondale Marine Ways, Incorporated?

A. Since March 1, 1949.

[fol. 57] Q. How long have you been employed in any capacity by Avondale?

A. Four and a half years.

Q. Do you have personal knowledge of the explosion aboard the drilling rig "Walter Russ" and the death of the decedent resulting from that explosion?

A. I do.

The Deputy Commissioner:

Off the record.

(Discussion off the record.)

By Mr. Sims:

Q. How many people were killed in that explosion?

A. Two.

Q. Who were they?

A. Joseph D'Arensbourg and Arthur Campbell, Jr.

The Deputy Commissioner:

Mr. Carter, as you know, a claim for compensation has also been filed in the Campbell case.

The Witness:

Yes, sir.

The Deputy Commissioner:

And is scheduled for hearing tomorrow.

The Witness:

Yes.

[fol. 58] The Deputy Commissioner:

And the statements which you may make on the witness stand now, I rather suspect, will be commented upon by counsel for the employer after your testimony for the purpose of making the record show that your testimony here today may be incorporated by agreement of the interested parties in the Campbell case tomorrow.

Mr. Sims:

That is correct, sir.

By Mr. Sims:

Q. What time did you arrive on the scene of the explosion?

A. Approximately fifteen minutes after the actual explosion.

Q. Do you recall the time of day or night of your arrival on the scene?

A. It was approximately 10:15.

The Deputy Commissioner:

When did the explosion occur?

The Witness:

Approximately 10:00 o'clock.

By Mr. Sims:

Q. A.M. or P.M.?

A. P.M., on July 20, 1951.

Q. Where was the drilling barge "Walter Russ" at the time of the explosion, at the time that you arrived upon the scene?

A. The drilling barge, at the time I arrived upon the scene, was resting on our marine railway approximately 350 feet from the water's edge.

[fol. 59] Q. What portion of the marine railway, the barge or the cradle was 350 feet from the water's edge?

A. The rear end of the marine railway cradle was approximately 300 feet from the water's edge, and the drill rig was resting on the cradle approximately 45 feet from the rear end, that is, the cradle extended behind the drill rig approximately 45 feet on the bank, and on the front the drill rig had an overhand on the cradle of approximately ten feet beyond the cradle.

Q. Had there been any change in the position of the cradle or the drilling rig from the time of the explosion until the time of your arrival on the scene?

A. None whatsoever.

Q. Mr. Carter, I show you three photographs which I will ask Mr. Henderson to mark for identification as Avondale 1, 2 and 3.

The Deputy Commissioner:

The said three photographs just mentioned by counsel for the defendant may be marked by the Court reporter for purposes of identification as Exhibits 1, 2 and 3.

Mr. Sims:

I should like for Mrs. D'Arensbourg——

The Deputy Commissioner:

I have just observed the Court reporter has marked on the back of each one of the photographs D-1, D-2, and D-3. That, of course, is for purposes of identification of the said photographs in connection with the testimony of the witness, just so that you might be clear which one you are referring to.

[fol. 60] Now, Mrs. D'Arensbourg, these are three photographs of the marine railway as it existed on the day of the explosion in this case, which counsel for the defendants has had marked for purposes of identification, so that he may ask some further questions about them. You will be given an opportunity to ask anything about said marine railway that you may desire to a little bit later.

Mrs. D'Arensbourg:

All right.

Mr. Sims:

I should like to ask, so it will be part of the record, if there will be any necessity for calling any photographer, the photographer who made these photographs, any such request on the part of Mrs. D' Arensbourg or you?

The Deputy Commissioner:

Off the record.

(Discussion off the record.)

The Deputy Commissioner:

On the record.

Mr. Sims:

The photographs are dated October 10, 1951. I intend to ask Mr. Carter if the photographs of the marine railway actually represent the condition of the railway as of the date of the death in this case.

The Deputy Commissioner:

Suppose you ask him that now.

[fol. 61] By Mr. Sims:

Q. I show you these three photographs marked D-1, D-2, and D-3, and ask you what they portray?

A. They are photographs of our marine railway, both the rails, the rail bed and the cradles.

Q. Do they show the marine railway, the tracks and the cradle and the general installation as it existed on the night of July 20, 1951?

A. Photograph D-3 shows the marine railway approximately 20 feet nearer the river than they were at the time of the explosion on July 20, 1951. I am able to make that statement for the reason that upon arriving at the accident and after seeing if anything could be done with the injured employees, we made a thorough investigation of all the facts

and conditions surrounding the barge, and we stepped off, paced off different distances, and I made my observation from the power line pole, which is directly in the picture in plain view. The marine railway was approximately ten feet above that post at the time of the accident.

The Deputy Commissioner:

With reference to the picture identified as D-3, which side of that picture, namely, the right end of the picture, right end of the photograph or the left end of the photograph, points or is in the direction of the river?

The Witness:

The left end of the photograph is in the direction of the river.

[fol. 62] By Mr. Sims:

Q. And do I understand your statement to be that on the night of the accident, the extreme upper end of the cradle of the marine railway was approximately twenty feet toward the right side of the picture than it is in the present photograph?

A. That's correct.

The Deputy Commissioner:

At this point let me ask, for purposes of further understanding maybe his question, which side of the photograph D-2 points in the direction of the river?

The Witness:

The left side of the photograph.

The Deputy Commissioner:

Which side of the photograph identified as D-1 is in the direction of the river?

The Witness:

The lower right-hand corner is really where it is.

By Mr. Sims:

Q. Have there been any substantial changes or any changes of consequence in the structure or condition of the marine railway since July 20, 1951?

A. None whatever.

Q. Can you state as a fact that the marine railway as it existed July 20, 1951 is as portrayed in these three photographs?

A. That's correct.

[fol. 63] Mr. Sims:

In connection with the testimony of the witness, I offer in evidence the three photographs, the photographs previously marked for identification as D-1, D-2, and D-3.

The Deputy Commissioner:

Mrs. D'Arensbourg, counsel for Avondale Marine Ways, Incorporated, desires to put into evidence and has offered into evidence three photographs which are photographs of the marine railway at Avondale Marine Ways, Incorporated, at Avondale, so-called Avondale, Louisiana, and Mr. Carter, who is now on the witness stand, has stated that these three photographs correctly portray the marine railway as it existed at the time of the injury and death of your husband on July 20, 1951.

Do you have any objection to receiving these photographs into evidence?

Mrs. D'Arensbourg:

No, sir.

The Deputy Commissioner:

I see. I see no objection to receiving them into evidence so far as your side of the case is concerned, and neither do I see any so far as the defendant's side of the case is concerned, but to the contrary, I think they are very helpful to both sides for a clear understanding of the setup or layout of the marine railway as it existed at the time of your husband's death.

[fol. 64] The said photographs identified as D-1, 2 and 3,

which have been offered into evidence by counsel for defendant, are now received into evidence, and the Court reporter is authorized to identify the same as Defendant's Exhibit No. 1 for the one marked D-1, and Defendant's Exhibit No. 2 for the one marked D-2, and Defendant's Exhibit No. 3 for the one marked D-3.

(The documents in question were received in evidence and were marked respectively Defendant's Exhibits 1, 2 and 3, and will be found attached to the back of the original transcript of the proceedings in this case.)

By Mr. Sims:

Q. Mr. Carter, do you know for what purpose and approximately when the railway on which the cradle rests may have been built?

A. I do not have knowledge of when it was built. However, I do know that prior to the construction of the Huey P. Long bridge, it was used as a railroad ferry by the Southern Pacific Railway. It was acquired by Avondale in 1938 and has been used since that time for getting new boats constructed into the water and getting boats out of the water for purposes of repair work.

The Deputy Commissioner:

In your particular case, Mr. Carter, and by that I mean for purposes and use of Avondale Marine Ways, Incorporated, what is this marine railway used for by Avondale?

[fol. 65] The Witness:

It is used for taking new vessels as they are constructed into the water.

The Deputy Commissioner:

You mean by that, putting them on the cradle on this marine railway and lowering the cradle into the water so the vessels can get into the water?

The Witness:

That's right. They are built—we often build vessels over on the side, over on the side of the marine railway, and then

we roll them over onto the marine railway and let them down into the water for launching.

The Deputy Commissioner:

That is one purpose. What other purpose?

The Witness:

The other purpose is to let the marine railway down the track into the water.

The Deputy Commissioner:

You mean the cradle?

The Witness:

Yes, the cradles of the marine railway into the water, and float marine equipment over the marine railway and bring them out of the water.

The Deputy Commissioner:

In other words, it is used for hauling vessels out of the water up to the marine railway, is that right?

[fol. 66] The Witness:

That's correct.

The Deputy Commissioner:

And that may be done for various reasons?

The Witness:

That's correct.

The Deputy Commissioner:

One of which could be and no doubt is frequently done at your place, at Avondale Marine Ways, for the purpose of getting to or having access to the bottom of a boat?

The Witness:

That's correct. We often bring them out of the water on the cradles of the marine railway and roll them over

and rest them on cribbing on the land so we can use the cradles over—of the marine railway to bring other boats up.

The Deputy Commissioner:

At this time or the time of the explosion on July 20, 1951, the barge, drilling rig as it is known, "Walter Russ," was resting on the cradle?

The Witness:

That's correct.

The Deputy Commissioner:

And the cradle on which it was then resting was on the tracks of the marine railway, which marine railway at that time extended directly down from the land into the water [fol. 67] of the Mississippi River, is that correct?

The Witness:

That's correct. The repair work required on the bottom of the "Walter Russ" was of a very short duration and did not require being rolled off of the marine railway for purposes of using it for other work.

The Deputy Commissioner:

But in this—

Mr. Sims:

May I continue with the examination of the witness, Mr. Henderson, and you will have ample opportunity to question——

The Deputy Commissioner:

Very well.

Mr. Sims:

—at a later time.

The Deputy Commissioner:

Very well. I will follow all my other questions immediately after his other testimony without any interruption from counsel for the defendant.

Mr. Sims:

I may have a few objections.

The Deputy Commissioner:

There will be no objections, no interruptions during the time I am questioning the witness, since you have interrupted me in questioning.

[fol. 68] Mr. Sims:

You constantly interrupted me, Mr. Henderson, and I simply asked you——

The Deputy Commissioner:

I have got a right to interrupt you any time I see fit. That is my prerogative; in my endeavor to try to understand the facts in the case.

Mr. Sims:

I agree with you, sir. You certainly do. I made a request if I could continue with the examination of the witness; I didn't make a demand. I think that your remark was a little harsh under the circumstances.

The Deputy Commissioner:

I do not like to be interrupted when I am asking the witness questions, because I have no personal interest in this matter. You are vitally interested, and this widow is. I am going to do everything I think is necessary to try to understand the true facts, and if that entails interrupting you when you are asking questions, to elicit explanations, I must of necessity be forced to do so.

Mr. Sims:

I can understand your position. Please continue with the interruption.

The Deputy Commissioner:

Since you interrupted me when I was asking vital questions to the case, which you may not desire me to do——

[fol. 69] Mr. Sims:

I have no desire to hide anything.

The Deputy Commissioner:

You can go ahead and question the witness. I don't like any thought or feeling on my part that you are antagonistic to my trying to bring out the facts in the case.

Mr. Sims:

Avondale has no desire to hide anything or to hide any facts. They want a complete disclosure of every kind.

The Deputy Commissioner:

I appreciate that. I am sure Avondale is that kind of a corporation.

Mr. Sims:

And counsel feels that same way about it.

The Deputy Commissioner:

Who?

Mr. Sims:

Their counsel today feels the same way about it.

The Deputy Commissioner:

I am awfully glad to know that. I thought that, but I didn't know if you really objected to my bringing out some pertinent points.

Mr. Sims:

Absolutely not. I simply have the examination organized. I thought that most of your questions would be answered,

[fol. 70] and I made the request that you permit me to continue the examination. However, you do govern the hearing.

The Deputy Commissioner:

You interrupted me in my questions, so I will go back and pick up all the questions I have at the expiration of your questioning without any interruptions from you.

Mr. Sims:

Yes, sir.

The Deputy Commissioner:

Proceed.

By Mr. Sims:

Q. Mr. Carter, do the rails of the marine railway above the water level rest on the earth?

A. They rest on the cross-ties which rest on the earth.

Q. Is it possible and is it actually a fact that the barge "Walter Russ" was hauled out in a position where the workmen could walk around on the earth all around the barge and the cradle?

A. That's correct.

Q. Was there any part of the barge or the cradle overhanging the water at the time of the explosion?

A. There was not any part of it overhanging the water. The extreme end towards the river of the marine railway cradle was approximately 300 feet from the water.

Q. Where is the cradle kept when it is not in actual use?

[fol. 71] A. Out of the water on the land, on the marine rails, on the land, of the marine rails.

Q. Now, do I understand from the previous testimony that the railway is used for the purpose of transporting new construction from its place of construction alongside the marine railway to the water?

A. That's correct.

Q. It is used for the purpose of removing vessels which are to be repaired, either on the cradle itself or alongside of the ways of the water?

A. That's correct.

Q. Does it have any other uses?
A. I don't think of any.

Mr. Sims:

That is all. I tender the witness.

Examination by the Deputy Commissioner.

By the Deputy Commissioner:

Q. Mr. Carter—
A. Yes, sir.
Q. —due to the fact that counsel for the defendants interrupted me a few moments ago when I tried to elicit some information in getting a better understanding of your answer to his question, I will now have to go back and duplicate some of the questions previously asked you, and you may have to duplicate some of your answers.
A. Yes, sir.
Q. A fact which I regret.

Mr. Sims:

I regret that the Commissioner took the position that my request was an interruption.

[fol. 72] By the Deputy Commissioner:

Q. Mr. Carter, why was the barge "Walter Russ" hauled out of the Mississippi River by the marine railway at your place of business at Avondale, Louisiana, at the time of the explosion on July 20, 1951?
A. It was hauled out for the purpose of cleaning the tanks and painting its bottom.
Q. The bottom could not, of course, be reached or painted while it was submerged or floating in the river?
A. That's correct.
Q. So, in order to get to the bottom or reach the bottom at the time, the drilling barge was hauled out of the water on July 20, 1951—that is one object, at least, so the bottom could be reached and, as you said, painted?
A. Yes, sir.
Q. At the time of the explosion on said barge on July 20, 1951, was the decedent, Joseph D'Arensbourg, on the barge

which was then on the marine railway at the moment of the explosion?

A. He was inside of one of the tanks of the barge, of the drilling barge.

Q. And at the moment of the explosion he was inside one of the tanks of the drilling barge, and the drilling barge was then at that moment on the tracks of the marine railway that led directly down into the water, is that correct?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir, that's correct.

Q. And what was Joseph D'Arensbourg, the decedent in this case, doing on the barge at the time of the explosion?

A. He was cleaning the tank.

[fol. 73] Q. I take it from that that this drilling barge had probably one or more tanks?

A. That's correct.

Q. Which was comprised of one or more tanks?

A. That's correct.

Q. He was inside one of these tanks cleaning the tank?

A. That's right.

Q. The drilling barge "Walter Russ" at the time of the explosion on July 20, 1951, was I believe you previously stated resting on the cradle of the marine railway, and the cradle was on wheels, and the wheels were on the tracks of the so-called marine railway, and the tracks were fastened to timbers to hold the tracks into place, and the timbers rested on the ground or the earth, is that correct?

A. That's correct.

Q. Mr. Carter, you are testifying now as an official representative of Avondale Marine Ways, Incorporated, are you not?

A. That's correct.

Q. At the time of the explosion which resulted in the death of the decedent in this case, did the employer have immediate knowledge of said injury and death of the decedent, the deceased employee?

A. That's right.

Q. It has been admitted by counsel for the defendant and accepted by the widow in this case that written notice of the decedent's injury and death was not given within 30

days; you have just informed me that the employer, however, had immediate knowledge of the injury and death of the deceased employee, which occurred in this explosion, on said barge, on July 20, 1951?

A. Correct.

[fol. 74] Q. Was the employer prejudiced in any way by failure to give the employer a written notice of said injury and death?

A. No, sir.

Q. Does Avondale Marine Ways, Incorporated, have at their establishment a floating drydock?

A. No, sir, we have a floating drydock, not at this particular location, but at our other plant on the Harvey Canal, which is approximately ten miles from this location.

Q. Does Avondale Marine Ways, Incorporated, at their plant, let's say, at the place known and referred to as Avondale, Louisiana, have a graving drydock?

A. No, sir.

Q. Then, for the purpose of getting a boat out of the water so that the bottom, the underside of the boat might be inspected, repaired, painted or whatnot, you use the marine railway to get the boat out of the water in the same manner as a boat is elevated or gotten out of the water by floating drydock or any other kind of a drydock, by its buoyancy, pulls it out of the water, is that true?

A. No, sir.

Mr. Sims:

Objection to the question, improper, leading, speculative, conjectural.

The Deputy Commissioner:

The objection is entirely overruled.

A. The reasons for bringing it out are—

The Deputy Commissioner:

Answer my question.

A. No, sir.

[fol. 75] By the Deputy Commissioner:

Q. Was it used for the same purpose?

A. It is not the same method.

Q. Was it used for the same purpose?

A. The purpose is the same, but that is not the answer to the question, I don't think. Excuse me if I—

The Deputy Commissioner:

Go back and read the question.

(Record read.)

The Witness:

That is not true; buoyancy does not pull it out of the water. The reasons are the same but the methods are different.

By the Deputy Commissioner:

Q. In other words, the reasons for getting the boat out of the water are the same?

A. That's correct.

Q. But the method is different?

A. That's correct.

Q. The drydock, floating drydock, raises the vessel out of the water by its buoyancy?

A. That's correct.

Q. The graving, the vessel is floated in, we'll say, on a high tide or floated in on full water, the gate is closed, the water pumped out, the vessel rests on supports or something in the bottom of the graving drydock?

A. That's correct.

Q. You had operated neither one of those facilities at your plant?

[fol. 76] A. That's right.

Q. But to accomplish the same purpose, for getting a vessel out of the water, you use what you call marine railway for getting the vessel out of the water?

A. Which is a power—

Q. By means of a cable, as I understand it, a cable attached to some force, electric motor or engine—

A. An engine.

Q. And the other end hooked onto the marine railway?
A. Cradle.
Q. Onto the cradle; with the vessel resting on the cradle, by means of the cable you pull the vessel out of the water up?
A. By the power of the engine, that's correct.
Q. So that you may reach or inspect or do what is necessary to the bottom of the boat, which you couldn't do when the boat was afloat in the water?
A. Yes, sir.

The Deputy Commissioner:

Off the record.

(Discussion off the record.)

The Deputy Commissioner:

On the record.

The Deputy Commissioner has no further questions.

I would like to give Mrs. D'Arensbourg an opportunity to ask Mr. Carter, who is now on the witness stand, any questions that you may wish to ask him in connection with [fol. 77] the explosion or the drilling barge or the marine railway or anything, as it existed at the time of the explosion that killed your husband.
Do you have any questions to ask Mr. Carter?

Mrs. D'Arensbourg:

No, sir, I don't have any questions to ask him.
The Deputy Commissioner:
Any further questions of the witness?

Mr. Sims:

I have one or two, Mr. Henderson.

Re-Direct Examination.

By Mr. Sims:

Q. Is it possible to use floating drydocks to take new construction from the shore to the water?

A. No, sir.

Q. Is it possible to use a graving dock to take floating vessels on shore other than to pump out the graving dock itself?

A. No, sir, you can't move them from the location that they are in when the water is—

Q. So the marine railway serves other purposes than floating drydock or graving docks, is that not correct?

A. That's correct.

Mr. Sims:

That is all.

[fol. 78] Examination by the Deputy Commissioner.

By the Deputy Commissioner:

Q. To meet your needs and your purposes of your establishment, the marine railway is about the only adequate means that you can use in getting vessels in and out of the water of your establishment; isn't that about correct?

A. We also have—

Q. At Avondale?

A. We also have launching ways for taking boats back into the water. We don't—

Q. You lower them in the water in the marine railway; some are put in the water from the so-called launching ways?

A. Yes, sir.

The Deputy Commissioner:

Any further questions of the witness?

Mr. Sims:

No, sir.

The Deputy Commissioner:

Mrs. D'Arensbourg, do you have any questions at all to ask the witness before I excuse him from the witness stand?

Mrs. D'Arensbourg:

No, sir, I don't have any questions.

The Deputy Commissioner:

Mr. Carter, you are excused from the stand. Thank you.

[fol. 79] (The witness thereupon was excused and retired from the witness stand.)

At this moment, let's have a five or ten minute recess.

(Recess.)

The Deputy Commissioner:

The hearing will come to order again, please.

Mr. Sims:

For the record in this case, and also in the companion case of Mrs. Viola Campbell, widow, and minor children, which is coming up for hearing tomorrow, it is agreeable with Avondale Marine Ways, Incorporated, and we hereby offer to use Mr. Carter's testimony in that case, in the Campbell case, since his testimony applies equally to both cases.

The Deputy Commissioner:

The Deputy Commissioner wishes to recall Mr. Carter to the witness stand for one question.

Henry Z. Carter was recalled as a witness for and on behalf of the defendants, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and upon examination testified as follows:

The Deputy Commissioner:

I remind you you are still under oath to testify to the truth and nothing but the truth, any questions that may now be asked you.

[fol. 80] The Witness:

Yes, sir.

Examination by the Deputy Commissioner.

By the Deputy Commissioner:

Q. You have just heard the remarks made by Attorney Sims on behalf of Avondale Marine Ways, Incorporated, to the effect that your testimony in the D'Arensbourg case here today shall be used in the hearing scheduled for tomorrow, in the Campbell case?

A. Yes, sir.

Q. I believe Attorney Sims stated that your testimony here today would equally apply to the Campbell case, which is coming up here for hearing tomorrow, is that correct?

A. That's correct.

I would like to state that I testified that D'Arensbourg was in one of the tanks at the time of the explosion. Mr. Campbell was in the same tank, so that will be identical.

Q. That will be an identical situation in both instances?

A. All the way through, yes, sir.

Q. So, as you have previously stated, you are testifying as an official representative of Avondale Marine Ways, Incorporated, and although not in the least—don't misunderstand me—doubting the correctness of your attorney's statement, but for the purpose of further completeness of the record, is it agreeable for Avondale Marine Ways, for your testimony today to be incorporated in the hearing scheduled for tomorrow in the Campbell case?

A. It is.

[fol. 81] Q. Without your being present?

A. It is agreeable.

Q. Or without any official from Avondale Marine Ways being present, unless they desire to be present?

A. It is agreeable.

The Deputy Commissioner:

That is good. Thank you, Mr. Carter.

Do you have any further questions of Mr. Carter?

Mr. Sims:

No, sir.

The Deputy Commissioner:

You are excused.

(The witness thereupon was excused and retired from the witness stand.)"

Certified to be a true and correct copy of this witness' testimony in Case No. 434-177.

Edward D. Gilbert, (Court Reporter).

(The following testimony of Mr. Arthur Grant is a verbatim statement of his testimony which he gave in the Joseph D'Arensbourg case yesterday, November 27, 1951, and is copied hereinbelow from the transcript of the testimony as prepared by the Court reporter who took the hearing in the D'Arensbourg case yesterday:)

[fol. 82] "ARTHUR GRANT was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and, upon examination, testified as follows:

Examination by the Deputy Commissioner.

By the Deputy Commissioner:

Q. For the record will you state your full name, please?
A. Arthur A. Grant.
Q. And your address?
A. 1215 Exposition Boulevard, New Orleans, Louisiana.
Q. Your age?
A. Sixty-eight.
Q. Were you now connected in any capacity with Avondale Marine Ways, Incorporated on July 20, 1951?
A. No, sir.
Q. What is your professional avocation?
A. I am a mechanical engineer and marine surveyor.

The Deputy Commissioner:

Proceed, Mr. Sims.

Direct Examination.

By Mr. Sims:

Q. Mr. Grant, what is your present address, business address?

A. 1745 Canal Building. That is National Bank of Commerce Building.

[fol. 83] Q. Where did you take your degree of mechanical engineering?

A. Cooper Institute, New York.

Q. When?

A. I think about 1913.

Q. Do you hold any marine engineer's licenses?

A. I have a chief engineer's license unlimited.

Q. Do you hold any state engineer license?

A. I am a licensed mechanical engineer in the State of Louisiana.

Q. In connection with your present occupation of mechanical engineer and marine surveyor, do you have occasion to visit the shipyards and repair yards in this area generally?

A. It is my daily occupation.

Q. Do you have occasion to visit the plant of Avondale Marine Ways, Incorporated, at Avondale?

A. Yes, sir, quite frequently.

Q. How long have you been visiting that plant in pursuit of your occupation?

A. Since it opened.

Q. Do you remember about when it was, roughly?

A. I have just heard Mr. Carter say '38.

Q. So it has been approximately thirteen years?

A. Yes, sir.

Q. I show you three photographs previously introduced in evidence and marked Defendant's 1, Defendant's 2, and Defendant's 3, and ask you if you can tell me what is portrayed in the photographs, referring specifically to Defendant's 1.

A. That shows the cradle of the marine ways.

Q. You recognize the marine ways in that photograph?

A. Yes, sir.

[fol. 84] Q. Do you know anything concerning the history of the railway?

A. This marine——

The Deputy Commissioner:

Just answer his question.

A. Yes, sir.

By Mr. Sims:

Q. Will you state for the record, please, what you know?

A. This marine way is what is left of the Southern Pacific crossing from Harahan to Avondale. When the bridge was built, the Southern Pacific abandoned it. This ramp, incline or ramp, was used to get the cars off the barge or floats that they brought them across the river on. They had a cradle that they used to lower down to meet the end of the barge so as to level it up so the trains would run off from the barge onto the tracks. This cradle, of course, had to be movable, because the river rises and falls about sixteen feet between its high and low stages, and they had to have it so they could elevate it. They pulled it up and lowered it as the river rose or receded. The cars ran off on these tracks and went on about their business at Avondale. The tracks are the same. The equipment that pulled the cradle up is the same, that is, the steam winch is the same, and the cables—they probably have renewed them—are the same type. The cradle has been altered some; the cradle that took the cars off was a triangular shaped thing. This is flat.

[fol. 85] Q. Do you have any personal knowledge of the explosion aboard the barge "Walter Russ" on July 20, 1951?

A. No, sir.

Q. You were not consulted in any way in connection with that?

A. No, sir.

Q. In your visits to the plant of Avondale Marine Ways, Incorporated, have you had occasion to notice the uses to which the marine railway has been employed?

A. Yes, sir.

Q. Will you state what uses you have noted?

A. They use it to pull out boats and then when they have them pulled up, they sometimes roll them off on the side and repair them.

The Deputy Commissioner:

You said "pulled." Where, what?

The Witness:

Pull from the river up onto the barge to the river barge, and then when they are on the river barge, they roll them over on one side, put rollers on them, and rebuild them, demolish them, as they see fit; they also build boats on this river barge and roll them over onto this ways, and then the ways roll them down into the river.

The Deputy Commissioner:

If counsel for the defendant will have no objection to me interrupting this witness' testimony, I would like to ask him the question:

[fol. 86] Isn't it also true that they repair or paint barges on the marine railway itself that leads down into the water, rather than pull them off that marine railway over onto the side and do it?

The Witness:

Yes, sir, they do.

The Deputy Commissioner:

Proceed.

By Mr. Sims:

Q. Have you stated all of the uses which you notice, Mr. Grant? I should like for the record to be complete. If you can recall any additional uses which you have not mentioned, please do so.

A. I think I have covered the ground.

Q. When a vessel is hauled out of the water and remains on the cradle and is being worked on at that time, is it pos-

sible and do the workmen actually walk on the earth all around the cradle and the vessel?

A. They do.

The Deputy Commissioner:

Not necessarily, do they?

The Witness:

If they have to go around the boat, they do.

The Deputy Commissioner:

But he said—is it possible for them to walk around; they can also work on the vessel while it is on the cradle on the tracks of the marine railway, can't they?

[fol. 87] The Witness:

Certainly.

The Deputy Commissioner:

Such as was being done in the explosion that killed the decedent in this case?

The Witness:

Yes.

By Mr. Sims:

Q. Is it true then that no part of the cradle or the vessel overhangs the water at the time that the work is being done?

A. No. When the cradle is pulled up dry, it it considerably beyond the water on the lower end.

Q. Now, Mr. Grant, have you ever had any experience and, if so, state what it has been, at drydock plants or marine railway plants?

A. Oh, I spent fourteen years in the Morse Drydock Company; we had drydocks that took ocean vessels, also two marine railways.

Q. Where was this plant located?

A. Brooklyn, New York.

Q. Will you state the period spent there?

A. From about 1900 to 1914 or '15.

Q. Were you also employed later by Robbins Drydock?

A. Part of that time I was at Robbins Drydock, and they operate graving docks and floating, but no marine railways.

Q. What was the nature of your activity after 1915?

A. From there I went with the Sinclair Oil Company, in charge of their marine equipment, which included building [fol. 88] and maintaining a fleet of tankers; also while there, I designed marine railways for their use at Tampico, Mexico.

Q. How long did you remain with Sinclair?

A. Seven years.

Q. What was your position with them?

A. I was vice-president.

Q. What was your next position after leaving Sinclair?

A. I was general manager of the Jahncke Drydock and Shipbuilding Company at New Orleans. They operated two drydocks.

Q. What type drydocks?

A. Floating docks; they had no marine railways.

Q. When did you state working with Jahncke?

A. About 1920 or '21.

Q. When did you leave Jahncke?

A. 1923.

Q. And what have you done since 1923?

A. I have been marine surveyor and consulting engineer here in New Orleans.

Q. Do you have any official connections with any marine societies?

A. I represent the Bureau Veritas, which is an international classification society for building and maintaining of vessels.

Q. How long have you represented Bureau Veritas in this area?

A. Since 1923.

Q. In connection with your present occupation, I think you stated that you daily went around to the various repair yard-, shipyards, machine shops in New Orleans?

A. Yes, sir, that's right.

[fol. 89] Q. I should like to ask you, based upon your long experience in the field and your intimate knowledge thereof,

if there is any distinction drawn, by men in the shipping—ship repair and harbor enterprises, between a floating drydock and a marine railway?

A. Floating drydock——

Q. Answer the question, please, I asked you.

A. Yes, there is a distinction, yes, sir.

Q. Will you state what the distinction is?

A. Well, a marine railway is really a launching ways in reverse. You build a boat, put ways under it, cut them, let her slide down; this marine railway, you put the boat in, you pull it up, and you have it in the same position or practically that you had the boat before you launched it, and you work on it.

On the drydock, floating drydock, for instance, you have pontoons, and you fill them with water, you lower them down; that lowers it, rather, and you float the ship in, then they pump the pontoons out, and the pontoons have sufficient buoyance to lift the boat themselves, and the ship on top of it.

The comparison of a marine railway, as I see it, and a modern up-to-date dock, is about like a hansom cab to a Greyhound bus, they both carry passengers, but they can't be called the same sort of a thing.

The Deputy Commissioner:

Both accomplish the same purpose?

The Witness:

Yes.

[fol. 90] The Deputy Commissioner:

But in a different way?

The Witness:

Very different way.

The Deputy Commissioner:

One is probably more modern in its method than the other is?

The Witness:

Drydock is the Greyhound bus, and the other is a hansom cab. You couldn't call them both drydocks.

The Deputy Commissioner:

They both serve the same purpose?

The Witness:

They both carry passengers for hire.

The Deputy Commissioner:

But a floating drydock, as you have just referred to, and marine railway, they both serve the same purpose, to the extent of getting a vessel out of the water; one pulls it out of the water up on tracks and the other raises it in the floating drydock, raises it out by means of buoyancy of the drydock after the water is pumped out of its wings or pontoons?

The Witness:

That's right.

By Mr. Sims:

Q. Mr. Grant, is it true that a vessel in a floating drydock is afloat at all times?

A. Yes, sir, the drydock itself is floating.

[fol. 91] The Deputy Commissioner:

His answer is not completely responsive to your question. You asked him, if I remember correctly, isn't it true that a vessel on a floating drydock——

Mr. Sims:

Excuse me. A vessel in a floating drydock is afloat at all times——

May I withdraw that question? May I strike that and get it right?

The Deputy Commissioner:

Yes, strike the whole question. Eliminate it from the record.

By Mr. Sims:

Q. Is it correct that a floating drydock is floating at all times, whether it has a vessel in it or not?

A. Yes, sir, because the dock itself is afloat.

Q. Now, in the shipping business, ship repair business, various harbor enterprises, is a different term used than drydocking when a marine railway will be employed to remove a vessel from the water?

A. Yes, sir.

Q. What is the term in common use?

A. Say you are going to pull it out on the ways; when you put in on the drydock, you say you are going to dock it or drydock it, so to distinguish one from the other.

Q. Mr. Grant, insofar as the marine railway can be employed for completely removing vessels from the water to dry land, it serves a purpose beyond that which a floating drydock or a graving drydock can serve, does it not?

[fol. 92] A. Oh, yes; for instance, the marine railway at Higgins was built just to launch boats. He had a contract to build some 200 boats for the Army; and to launch them. He built them in a house and rolled them down, then rolled them on and built this ways to lower them down; and that, now, is a marine railway that he pulls barges out on, but it was originally—its original intention was to lower the ships or the boats that he was building for the government into the water.

The Deputy Commissioner:

Since you mention Higgins has this facilities, may I ask you if Higgins also uses marine railways for purposes of pulling a boat out of the water for inspection or repairs or what-not?

The Witness:

Yes, he uses that now in reverse of his launching. He puts it down and pulls boats up and lands them, rolls the

mover onto his yard up there and rebuilds, does whatever he wants with them.

The Deputy Commissioner:

Since you mentioned a moment ago the fact that Morse and Robbins, I believe is the name you said, in New York, perhaps in New York City?

The Witness:

Yes.

The Deputy Commissioner:

—also used marine railways; and now, since you mentioned Higgins, which you refer to, I am sure, Higgins Company or whatever it is here in New Orleans——

[fol. 93] The Witness:

Yes.

The Deputy Commissioner:

(Continuing) —also has a marine railway, and since it is now an established fact that Avondale Marine Ways also has a marine railway, may I ask you: It is quite common for concerns or establishments to have marine railways in connection with their work, and that the fact that Avondale Marine Ways happens to have one is not just an isolated occurrence? I mean, they are not the only one that has them; they are used by others in other parts of the city and in other localities around the country. Isn't that true?

The Witness:

Yes, marine railways are common. The one at Avondale is what we call an improvised marine railway from the ramp of the Southern Pacific Railroad, but the marine railways of themselves are common in this industry.

The Deputy Commissioner:

That was my understanding. Proceed, Mr. Sims.

Mr. Sims:

No further questions.

The Deputy Commissioner:

Mrs. D'Arensbourg, do you have any questions that you wish to ask the witness who is now on the witness stand?

Mrs. D'Arensbourg:

No, sir, I don't have any questions.

[fol. 94] The Deputy Commissioner:

No questions by the Deputy Commissioner, so, Mr. Grant, you are excused from the witness stand.

Mr. Sims:

Don't you want to ask him about tomorrow's testimony?

The Deputy Commissioner:

Yes. Before excusing the present witness from the witness stand, I believe Mr. Sims has indicated he wished to ask him one further question.

By Mr. Sims:

Q. Mr. Grant, there is a companion case scheduled for hearing tomorrow in the matter of the claim of Mrs. Viola Campbell on account of the death of Arthur Campbell, Jr., and Avondale Marine Ways, Incorporated would like to state for the record that your testimony is equally applicable to the Campbell case, and would like to ask you if you have any objection to your testimony being used tomorrow in that case, although you personally are not present?

A. No, sir, not at all.

The Deputy Commissioner:

May I ask counsel for the defendant if the defendant has any objection to using Mr. Grant's testimony here today and having his testimony here today incorporated in the hearing in the Campbell case tomorrow?

Mr. Sims:

No, sir, no objection; in fact, we tender it.

[fol. 95] The Deputy Commissioner:

You are excused then, Mr. Grant. Thank you.

(The witness thereupon was excused and retired from the witness stand.)"

Certified to be a true and correct copy of this witness' testimony in Case No. 434-177.

Edward D. Gilbert, Court Reporter.

COLLOQUY BETWEEN COURT AND COUNSEL

The Deputy Commissioner:

At the hearing yesterday, in the D'Arensbourg case, the defendant offered certain photographs of the marine railway layout as it existed at the time of the explosion and death of the decedent in this hearing today, and also as it existed at the time of the death of the decedent in the D'Arensbourg case yesterday. I believe counsel for the defendant has now duplicates of those photographs, and which I think he would like to put into the record in this case, and which I also would like to have them put into the record in this.

You have them now, do you not, Mr. Sims?

Mr. Sims:

Yes, sir. Shall I make the offer?

The Deputy Commissioner:

If you please.

Mr. Sims:

Mr. Commissioner, I should like to offer in connection with the stipulated testimony of Mr. Henry Z. Carter and [fol. 96] Mr. Arthur A. Grant three photographs which were identified yesterday as D-1, D-2, and D-3, and which I now offer in evidence as Defendants' exhibits A, B and C, respectively.

The Deputy Commissioner:

Mrs. Viola Campbell, the photographs which counsel for the defendant has just offered and introduced into evidence in your case here now are photographs, three photographs showing the layout of the marine railway at Avondale Marine Ways, which pictures were taken on October 10, 1951, and which reflect the marine railway tracks, cradles and so forth, used on the marine railway as it existed at the time of your husband's death.

The Claimant:

Yes.

The Deputy Commissioner:

These photographs give you a rather clear picture of the marine railway, and I think are helpful to all parties concerned in better understanding the marine railway layout at the plant of Avondale Marine Ways.

The Claimant:

Yes.

The Deputy Commissioner:

So I know of no way that these photographs can hurt your side of the case. Do you have any objection to me receiving these three photographs into the evidence of your case here today?

[fol. 97] The Claimant:

No, sir.

The Deputy Commissioner:

With that understanding by the widow in this case, the said three photographs are received into evidence and the Court reporter is authorized to identify the same as Defendants' Exhibits A, B and C, respectively, in the order in which they were introduced.

(The documents in question were received in evidence and were marked respectively Defendants' Exhibits, A, B, and C,

and will be found attached to the back of the original transcript of the proceedings in this case.)

The Deputy Commissioner:

Mr. Sims, as attorney for the defendant in this case, do you have any witnesses to testify at this time at this hearing?

Mr. Sims:

No, sir.

The Deputy Commissioner:

Do you have any further evidence of any kind to offer on behalf of the defendant at this hearing at this time?

Mr. Sims:

No, sir.

The Deputy Commissioner:

Does the defendant rest their side of the case at this point?

[fol. 98] Mr. Sims:

The defendant rests, sir.

The Deputy Commissioner:

Mrs. Viola Campbell, it was your contention, or is your contention in this case that you contend your husband's death comes, or was sustained under circumstances coming under the Longshoremen's Act, isn't that correct?

The Claimant:

Yes.

The Deputy Commissioner:

And it is your contention that you and your children are entitled to compensation under the Longshoremen's Act, is that right?

The Claimant:

Yes.

The Deputy Commissioner:

And you deny that the injury and death of your husband comes under the Louisiana State Compensation Law, is that right?

The Claimant:

Yes.

The Deputy Commissioner:

Do you have any further evidence, or anything to offer on behalf of yourself or your minor children in this hearing here today, Mrs. Campbell?

[fol. 99] The Claimant:

No, sir.

The Deputy Commissioner:

Are you willing for your side of the case, and this hearing in its entirety to be closed at this time?

The Claimant:

Yes.

The Deputy Commissioner:

Are you satisfied with the hearing that we've had here this morning in connection with your case?

The Claimant:

Yes, sir.

The Deputy Commissioner:

With those statements by the widow in this case and the defendant having rested his side of the case, I know of nothing further that can be done in connection with either side

of the case, for that matter. Therefore, I declare the hearing concluded at this time, which is 11:55 a. m.

The Deputy Commissioner will render his decision in due course. Thank you very kindly.

(Thereupon the instant hearing was concluded.)

[fol. 100] CLAIMANT'S EXHIBIT 1.

11/28/51.
434-178.
EG.

State of Louisiana,
Parish of St. Charles.

Be It Remembered, that on this 22nd day of May, 1934, by virtue of a written License to me directed by the Honorable the Twenty-Fourth Judicial District Court in and for the Parish of St. Charles, I, the undersigned, W. P. Patterson Justice of the Peace did celebrate the Bonds of Matrimony between Mr. Arthur Campbell, Jr. and Miss Viola Lucas in the presence of certain chosen witnesses, whom, with the married parties, I have caused to sign this instrument in duplicate, at the place and on the date above written, one copy of which is returnable to the said Court, to be filed and recorded therein as evidence of said fact and in compliance with law.

(S) Arthur Campbell, Viola Lucas, Married Parties.
Witnesses: Joseph E. Woods, Arthur Campbell, Sr., Joe Lucas. (S) W. P. Patterson, Judge.

[fol. 101] I hereby certify that the above is a true and correct copy of an original marriage record submitted to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

CLAIMANT'S EXHIBIT 2.

11/21/51.
434-178.
EG.

Certificate of Birth.

"Suffer Little Children to come unto me and forbid them not". Matt. Canaan B. C.

Killona, Louisiana.

This is to certify That Velmar Lee Cambell is the child of Mr. & Mrs. Arthur Cambel and Viola Lucas Born in Killona, La. on the 19th day of October, 1934 was blessed Dec. 2nd, 1934 According to the Rules of the Baptist Church by Rev. J. B. Davis.

Sponsors Joseph Woods, Jr., Mary Lee Woods as being on the Roll of this Church.

Date 7/31/1951.

(S) Rev. J. B. Davis, Pastor.

[fol. 102] I hereby certify that the above is a true and correct copy of the original Certificate of Birth presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

CLAIMANT'S EXHIBIT 3.

11/28/51.
434-178.
EG.

The United States of America.
Department of Commerce.
Bureau of the Census.
Washington.

Notification of Birth Registration.

This certifies that the following Record of Birth is registered and preserved in the office of the State Register of Vital Statistics at New Orleans, La. Name Thelma Campbell, Sex Female, No. 15992, Date of Birth July 28, 1936,

Place of Birth Killona, La. Name of Father Arthur Campbell, Maiden Name of Mother Viola Campbell.

(S.) W. L. Austin, Director of Census, (S.) J. Hans, ml, Special Agent, Bureau of the Census.

[fol. 103] I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

CLAIMANT'S EXHIBIT 4.

11/28/51.
434-178.
EG.

The United States of America
Department of Commerce
Bureau of the Census
Washington

Notification of Birth Registration.

This certifies that the following Record of Birth is registered and preserved in the office of the State Registrar of Vital Statistics at New Orleans, La. Name Rona May Campbell, Sex Female, No. 22841, Date of Birth May 6, 1938, Place of Birth Killona, Name of Father Arthur Campbell, Maiden Name of Mother Viola Lucas.

(S.) W. L. Austin, Director of the Census, (S.) J. Hans, ml, Special Agent, Bureau of the Census.

[fol. 104] I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

CLAIMANT'S EXHIBIT 5.

11/28/51.
434-178.
EG.

The United States of America
Department of Commerce
Bureau of the Census
Washington

Notification of Birth Registration

This certifies that the following Record of Birth is registered and preserved in the office of the State Registrar of Vital Statistics at New Orleans, Louisiana. Name Arthur Campbell, Jr., Sex male, No. . . . . Date of Birth November 27, 1939, Place of Birth Killona, St. Charles Parish, La., Name of Father, Arthur Campbell, Name of Mother Viola Lucas.

(S.) W. L. Austin, Director of the Census, (S.) J. Hans, ml, Special Agent, Bureau of the Census.

[fol. 105] I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

CLAIMANT'S EXHIBIT #6.

11/28/51.
434-178.
EG.

Office of Recorder of Births, Marriages and Deaths.
Parish of Orleans.

Municipal Office Building, Carondelet and Lafayette Streets,

No. 37047.

This is to certify that Roger Campbell (Colored) lawful son of Arthur Campbell and Viola Lucas was born on the

16th day of February 1942, and registered in Book No. 215 Folio 324, on the 25th day of February, 1942.

(S.) W. J. Prudhomme, Deputy Recorder.

[fol. 106] I hereby certify that the above is a true and correct copy of the original birth record presented to this office on August 9, 1951 by Mrs. Viola Campbell.

(Mrs.) Grace L. Ryan, Clerk-Stenographer, W. J. Prudhomme, Deputy Recorder, Births, Marriages and Deaths, Parish of Orleans.

CLAIMANT'S EXHIBIT 7.

11/28/51.
434-178.
EG.

Notification of Birth Registration.

Registrant:

Full name—Campbell, Clarence Rundles.
Sex—Male.
Date of Birth: Month—November. Day—26. Year—1944.

Parents:

Maiden Name of Mother—Lucas, Viola.
Color or Race—Col.
Father's Name—Campbell, Arthur.
Color or Race—Colored.

Place of Birth:

City or Town—Ward—New Orleans.
Parish—Orleans.
State—La.

[fol. 107] Certificate:

Certificate filed No. 228/1712.

Date issued:

Month—November. Day—29. Year—1944.

Issued to—

Viola Campbell, Box 41, Killona, Louisiana.

The United States of America.
Department of Commerce—Bureau of the Census.

This certifies that a record of birth is registered with City of New Orleans, Dept. of Health.

(S.) W. J. Prudhomme, Registrar. John M. Whitney, M. D., City Health Officer and special agent, Bureau of the Census.

I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

[fol. 108] CLAIMANT'S EXHIBIT 8

11/28/51.
434-178.
EG.

(Seal)

Recorder of Births, Marriages & Deaths
Parish of Orleans

State of Louisiana.

This is to certify Edna Ann Campbell (col.) lawful daughter of Arthur Campbell, Jr., and Viola Lucas was born on the 16th day of August, 1946 and registered No. 237 Folio 472.

(S.) W. J. Prud.

(This corner of certificate torn off eliminating balance of signature).

I hereby certify that the above is a true and correct copy of original record of birth presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

[fol. 109] CLAIMANT'S EXHIBIT 9

11/28/51
434-178
EG

Sim B. Shattuck, Director
City of New Orleans Health Department
Bureau of Vital Records

Notification of Birth Registration

John M. Whitney, M. D.
Sup't of Public Health

Full Name Lionel Foster Campbell, Color Col, Sex Male, Date of Birth: Month Aug. Day 27. Year 1948, Place of Birth New Orleans, La. Father's Name Arthur Campbell, Maiden Name of Mother Viola Lucas, Certificate File No. 12-506 Date Issued: Month Sept. Day 7, Year 1948.
(Seal)

I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.
((Mrs.) Grace L. Ryan), Clerk-Stenographer.

[fol. 110] CLAIMANT'S EXHIBIT 10

11/28/51
434-178
EG

City of New Orleans Health Department
Bureau of Vital Records
Notification of Birth Registration
New Orleans, La.

Full Name—Brenda Joyce Campbell.
Date of Birth: Mo.—4. Day—17. Year—1950.
Color or Race—Colored.
Sex—Female.
Place of Birth—New Orleans, La.
Date Issued: Mo.—5 Day—1. Year—1950.

Index No.—157 50 005 912.
Father's Name—Arthur Campbell.
Native of—La.
Maiden Name of Mother—Viola Lucas.
Native of—La.
[fol. 111] Issued to: Mrs. Arthur Campbell, P. O. Box 41, Killona, La.

This is not a certified copy.

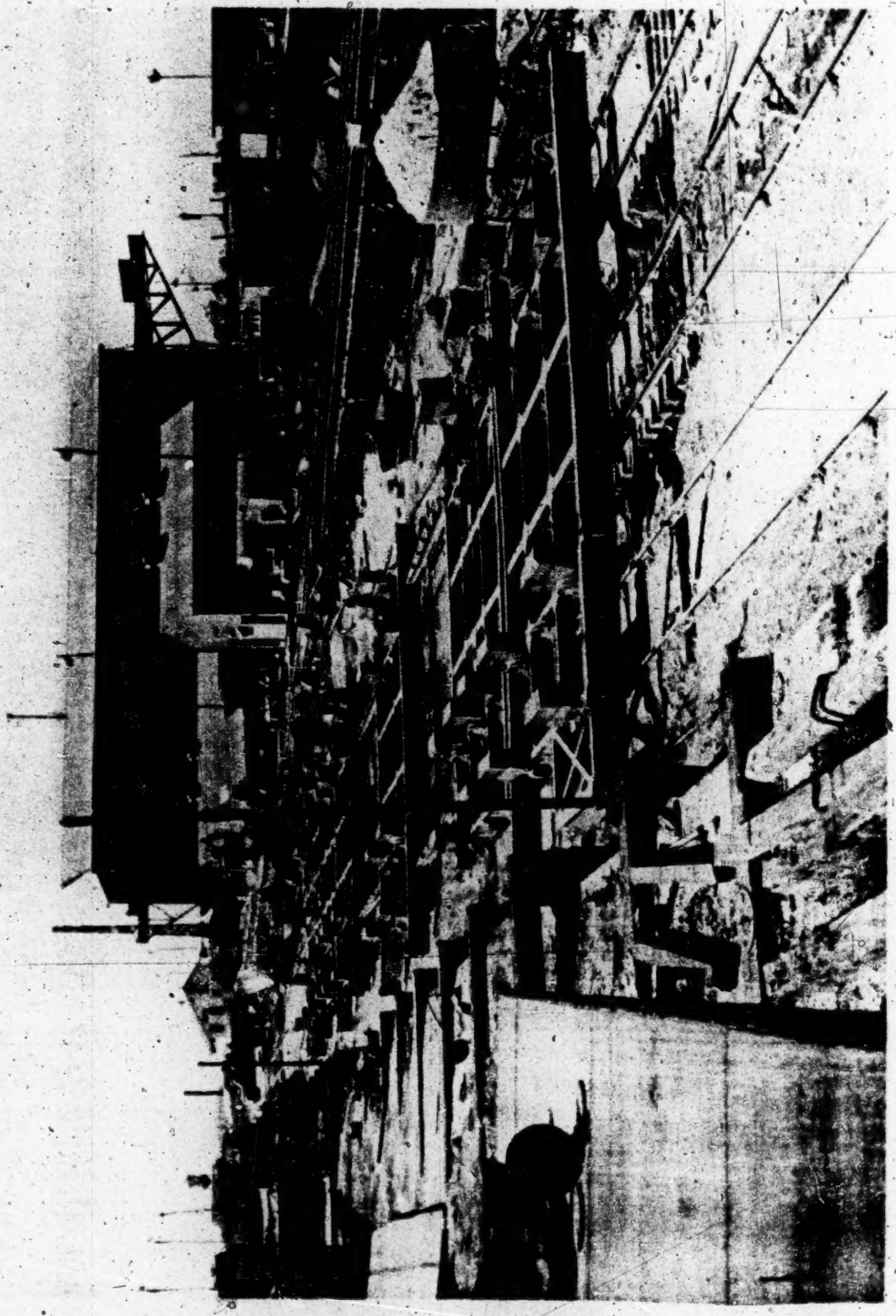
(S.) Naomi M. Drake, Deputy Registrar. (Seal.)

I hereby certify that the above is a true and correct copy of the original Notification of Birth Registration presented to this office on August 9, 1951 by Mrs. Viola Campbell.

((Mrs.) Grace L. Ryan), Clerk-Stenographer.

(Here follows 3 photos, fols 112, 113, 114)

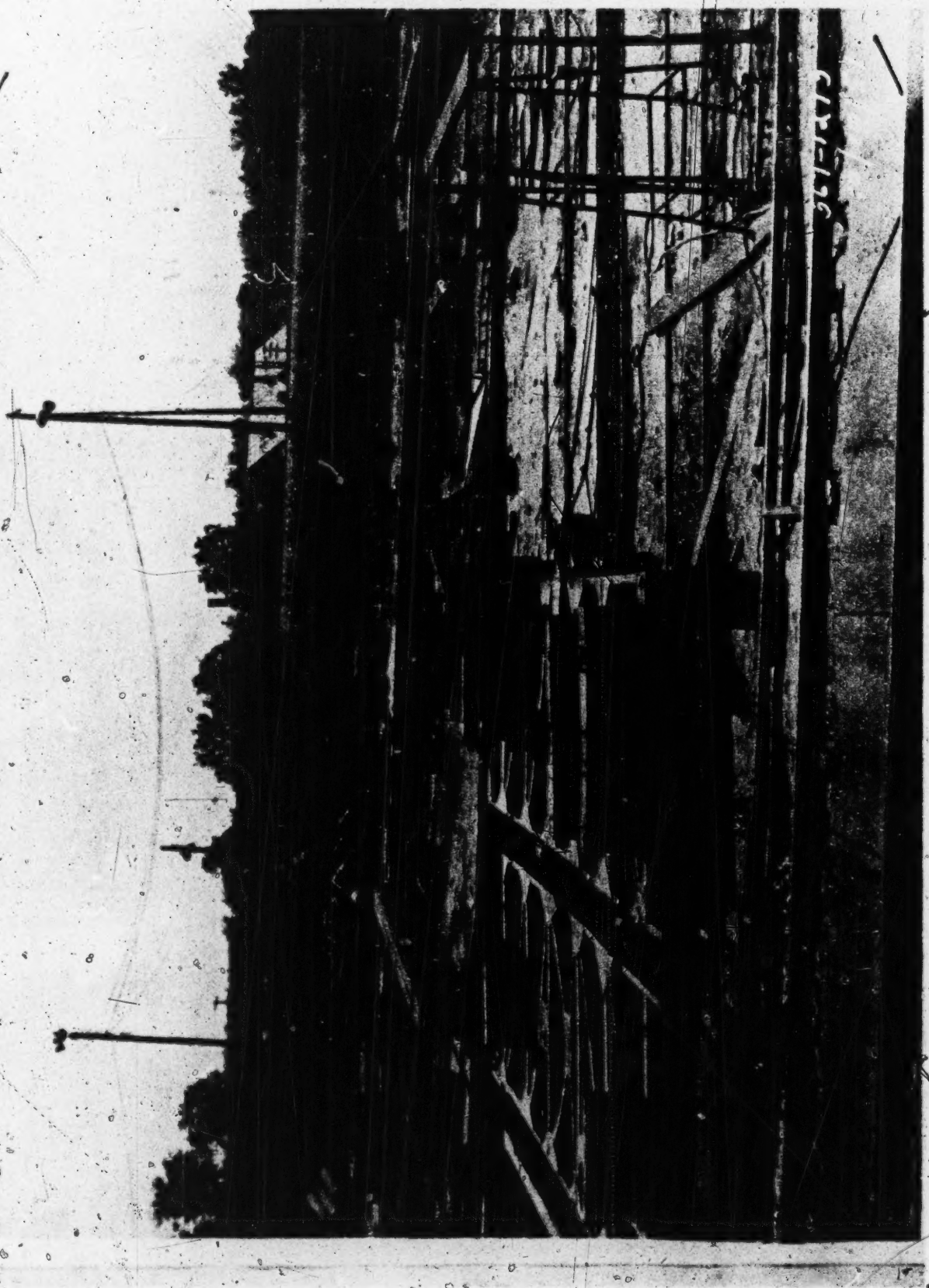
DEFENDANT'S EXHIBIT "A" 84A



DEFENDANT'S EXHIBIT "B" 841

DEFENDANT'S EXHIBIT "C"

846



[fol. 115] IN UNITED STATES DISTRICT COURT

HEARING ON MOTION OF DEFENDANT FOR SUMMARY JUDGMENT, ARGUMENT AND SUBMISSION—February 20th, 1952

This cause came on this day to be heard on motion of defendant for summary judgment;

Present: G. Harrison Scott, Attorney for defendants; John W. Sims, Attorney for plaintiffs;

After hearing argument of counsel for the respective parties, the matter was submitted and the Court took time to consider.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT—February 21st, 1952

This cause came on to be heard on February 20th, 1952 on motion of defendants for summary judgment and was [fol. 116] argued by counsel for the respective parties and submitted when the Court took time to consider;

Now therefore, after due consideration;

It Is Ordered that the motion of defendants for summary judgment be and the same is hereby, Granted, in Nos. 3226 and 3227.

Continental Casualty Company v. Lawson, 64 Fed. (2) 802;

Maryland Casualty Company v. Lawson, 101 Fed. (2) 732.

IN UNITED STATES DISTRICT COURT

JUDGMENT—February 28, 1952

Judge Wright

Considering the order entered by the Court on February 21, 1952, granting the motion of defendants for summary judgment in each of the above entitled cases;

It Is Ordered, Adjudged and Decreed by the Court that judgment be and is hereby entered in each of the above

entitled cases in favor of the defendants and against the plaintiffs, dismissing plaintiff's suits, with costs.
J.S.W.

[fol. 117] In United States District Court

Notice of Appeal—Filed March 14, 1952

Notice is hereby given that Avondale Marine Ways, Inc., plaintiff above named in said action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment sustaining the Motion for Summary Judgment entered in this action on February 29, 1952.

March 14, 1952.

(S.) John W. Sims, (S.) Ashton Phelps, Attorneys for Avondale Marine Ways, Inc., Tenth Floor United Fruit Building, New Orleans 12, Louisiana. Mendes & Mount, 27 William Street, New York 5, New York and Phelps, Dunbar, Marks & Claveria, Tenth Floor United Fruit Building, New Orleans 12, Louisiana, Of Counsel.

[fols. 118-120] Bond on appeal for $250.00 approved and filed March 14, 1952 omitted in printing.

[fols. 121-122] Designation of record on appeal and certificate of service (omitted in printing.)

[fol. 123] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 124] Argument and Submission—January 13, 1953 (omitted in printing.)

[fol. 125] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14055

AVONDALE MARINE WAYS, INC., Appellant,

versus

JOSEPH H. HENDERSON, Deputy Commissioner, et al., Appellees

No. 14056

AVONDALE MARINE WAYS, INC., Appellant,

versus

JOSEPH H. HENDERSON, Deputy Commissioner, et al., Appellees

Appeals from the United States District Court for the Eastern District of Louisiana

OPINION—Filed January 29, 1953

Before HUTCHESON, Chief Judge, and STRUM and RIVES, Circuit Judges

HUTCHESON, Chief Judge: Filed under the provisions of the Longshoremen's Act of March 4, 1927,[1] these suits were brought to enjoin and set aside as not in accordance with law, compensation orders issued by the deputy commissioner in favor of the dependents of two of appellant's employees who had been killed in an explosion[2] on a barge upon which they were working.

[fol. 126] The claim of appellant was that the place where,

[1] 44 Stat. 1424, 33 U. S. C. A., Sec. 901 et seq.

[2] By stipulation or by uncontroverted testimony, it was established that, at the time of the explosion the barge had been hauled out of the Mississippi River on the cradle of a marine railway, and that both cradle and barge at the time of the explosion and for some time previously thereto had been at rest ashore at a point some 400 feet from the water.

and the circumstances under which, the injuries occurred are such that the Louisiana State Compensation Act furnished the exclusive remedy; that the Longshoremen's and Harbor Workers' Compensation Act was therefore inapplicable; and that the deputy commissioner was without jurisdiction or authority to make an award. In short, its position was that the language, "navigable waters of the United States, including any dry dock," as those words are used in Sec. 3(a) of the Act, 33 U. S. C. A. 903(a) does not extend to and include the marine railway.

The commissioner, as vigorously contending that a marine railway is a dry dock within the meaning of the Act, filed a motion for summary judgment.

The district judge, on the authority of two cases decided by this court, *Continental Casualty Company* v. *Lawson*, 64 F (2) 802, and *Maryland Casualty Co.* v. *Lawson*, 101 F (2) 732, granted the motion and entered judgments dismissing the suits with costs.

Here seeking their reversal, appellant concedes that the decisions of this court, on which the district judge, relies, do support the judgments. It insists, however, that these cases were wrongly decided; that they have been in effect overruled by later decisions of the Supreme Court; and that this court should now disavow them.

We cannot agree with these views. Quite to the contrary, we are of the clear opinion that the cases were when decided well decided; that no case since decided furnishes any sound basis for a different view; and that many cases which have been decided since[1] have given the questioned decisions full support and approval.

The judgments appealed from were rightly entered. They are affirmed.

[fol. 127] Rivers, Circuit Judge, dissenting:

This accident occurred over dry land some four hundred feet from the water's edge. That part of the marine rail-

---

[1] DeBardeleben Coal Corp v. Henderson, 142 F(2) 481; Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F(2) 968; Massachusetts Bonding & Insurance Co. v. Lawson, 149 F(2) 853; Western Boat Bldg. Co. v. O'Leary, 198 F(2) 409.

way on which the ship rested differed from a dry dock in the respect upon which the Longshoremen's Act turns in that it was not in or over navigable waters. The Jones Act is amphibious. *O'Donnell* vs. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36, 42. The Longshoremen's Act, on the other hand, is restricted to compensation for injuries occurring on navigable waters. *Swanson* vs. *Marra Bros.*, 328 U. S. 1. We have here the reverse of the situation presented in *Nogueira* vs. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, and *Pennsylvania R. Co.* vs. *O'Rourke*, Supreme Court of U. S., January 12, 1953, No. 60—October Term, 1952, in which it was held that the extension of a railroad on to a boat in navigable waters did not carry with it the Federal Employer's Liability Act. Here it seems to me that the extension of the marine railway to a point some 400 feet ashore did not carry with it the Longshoremen's Act. The case of *Pennsylvania R. Co.* vs. *O'Rourke*, *supra*, makes plain that the Act "is directed at the employer when it speaks of maritime employment, not at the work the employee is doing." As in the case of a longshoreman injured on a dock while engaged in unloading a vessel (*State Industrial Commission* vs. *Nordenholt Corporation*, 259 U. S. 263), the simple distinction that must be maintained, I think, is between injuries on land and those suffered upon navigable waters.

Further, "Congress made clear its purpose to permit state compensation protection whenever possible." *Davis* vs. *Department of Labor and Industries*, 317 U. S. 249, 252, 253; see *Parker* vs. *Motor Boat Sales*, 314 U. S. 244, 249, 250. Ashore is the natural habitat of the State compensation acts, and it seems to me that the Longshoremen's Act cannot survive on land. I, therefore, respectfully dissent.

[fol. 128] IN UNITED STATES COURT OF APPEALS

No. 14055

AVONDALE MARINE WAYS, INC.,

versus

JOSEPH H. HENDERSON, Deputy Commissioner, et al.

JUDGMENT—January 29, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Avondale Marine Ways, Inc., and the surety on the appeal bond herein, Seaboard Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Per Rives, Circuit Judge, dissents."

[fol. 129] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

STIPULATION—Filed April 9, 1953

Inasmuch as the above cases present the same questions of law, and similar questions of fact, and were consolidated for hearing before the United States District Court and disposed of by the District Court in one opinion; and inasmuch as they were again consolidated for briefing and hearing in this Court, the record in the case of Avondale Marine Ways, Inc., vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055, alone being printed, this Court rendering one opinion in the two cases:

It is stipulated and agreed by and between the parties hereto, by and through their undersigned attorneys of

record, that the certified transcript of the record in only one case, that of Avondale Marine Ways, Inc., vs. Joseph Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055, be submitted to the United States Supreme Court on any petition for certiorari, and it is further stipulated and agreed by and between the parties [fols. 130-131] hereto that the case of Avondale Marine Ways, Inc., vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14056 abide and follow the decision of the United States Supreme Court in the case of Avondale Marine Ways, Inc. vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055.

(S.) John W. Sims, Counsel for Avondale Marine Ways, Inc., Appellant. (S.) G. Harrison Scott, Counsel for Joseph H. Henderson, Deputy Commissioner, et al., Appellees.

ORDER

It is ordered by the Court that the foregoing stipulation be approved and filed, and it is further ordered that the case of Avondale Marine Ways, Inc. vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14056, abide and follow the decision of the United States Supreme Court in the case of Avondale Marine Ways, Inc., vs. Joseph H. Henderson, Deputy Commissioner, et al., Circuit Court of Appeal Docket No. 14055.

(S.) J. C. Hutcheson, Jr., Judge, United States Court of Appeals for the Fifth Circuit. April 9th, 1953.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 132] SUPREME COURT OF THE UNITED STATES—October Term, 1952

No. 744

AVONDALE MARINE WAYS, INC., Petitioner

vs.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, ET AL.

ORDER ALLOWING CERTIORARI—Filed June 8, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~944~~ 44

AVONDALE MARINE WAYS, INC.,

Petitioner,

against

JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, WELMAR LEE CAMPBELL, THELMA CAMPBELL, RONA MAY CAMPBELL, ARTHUR CAMPBELL, JR., ROGER CAMPBELL, CLARENCE RUNDLES CAMPBELL, EDNA ANN CAMPBELL, LIONEL FOSTER CAMPBELL and BRENDA JOYCE CAMPBELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

FRANK A. BULL and ASHTON PHELPS,
Counsel for Petitioner.

JOHN W. SIMS,
DANIEL HUTTENBRAUCK,
of Counsel.

Bowne & Co., Inc., 163 Front Street, New York 38

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Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

AVONDALE MARINE WAYS, INC.,
Petitioner,

against

JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, THELMA CAMPBELL, RONA MAY CAMPBELL, ARTHUR CAMPBELL, JR., ROGER CAMPBELL, CLARENCE RUNDLES CAMPBELL, EDNA ANN CAMPBELL, LIONEL FOSTER CAMPBELL and BRENDA JOYCE CAMPBELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The petition of Avondale Marine Ways, Inc. respectfully shows to this Honorable Court as follows:

Summary Statement of the Matter Involved.

This is a petition by Avondale Marine Ways, Inc., employer, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision and judgment of that Court (R. 125-8), which affirmed a final judgment of the United States District Court for the Eastern District of Louisiana (R. 116) dismissing petitioner's complaint in a suit to enjoin and set aside a compensation order and award of respondent Joseph H. Henderson, Deputy Commissioner, in favor of the other re-

spondents, under the Longshoremen's and Harbor Workers' Compensation Act (R. 10-18). The petitioner's action to set aside the compensation order and award was based on the Deputy Commissioner's lack of jurisdiction or authority to make an award because the accident involved occurred on land and not on the navigable waters of the United States or a dry dock (Complaint, R. 4-9). There is only a question of law involved, as the facts are either stipulated or not controverted (R. 31-99, 125, 201 F. 2d 438, Note 2).

The facts involved in this litigation are as follows:

Petitioner is a Louisiana corporation owning and operating a marine repair yard on the Mississippi River at Avondale, Louisiana (R. 33). On August 20, 1951, Arthur Campbell, a laborer in the employ of petitioner, was cleaning on a barge known as the Walter Russ when a flash explosion occurred on the barge, causing his death (R. 10-11, 31-2). At the time of the accident the barge, which was not owned by the petitioner, was on a cradle of petitioner's marine railway at said yard, around 400 feet from the river's edge. No part of the barge, or of the cradle on which it had been hauled ashore and then rested, was in, on or over any water (R. 11, 32, 125 note 2). The respondents, other than the Deputy Commissioner, are the widow and children of said Arthur Campbell, deceased (R. 12-16, 33-5).

A similar action involving another employee, Joseph D'Arensbourg, in the same explosion was brought by the same plaintiff against the same Deputy Commissioner and the widow and children of the decedent. The two actions involved identical facts, except for the names of the decedents and other interested parties, and they were consolidated in the District Court, on motion of the Deputy Commissioner (R. 18-19), and the District Court granted summary judgment upholding the Deputy Commissioner's

awards in both cases (R. 115-16). In the Court of Appeals the two cases were consolidated for briefing and hearing on the record in the *Campbell* case (R. 2-3). This petition is based on the record in the *Campbell* case, an order having been entered in the Court of Appeals that the judgment in the *D'Arensbourg* case will abide the final decision in the *Campbell* case (R. 130), as both cases involve the same issues.

Statutes Involved.

This case involves the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 903(a), 44 Stat. 1426 which provides:

> "Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, *but only if* the disability or death results from an injury *occurring upon the navigable waters* of the United States (including any dry dock) *and if* recovery for the disability or death through workmen's compensation proceedings *may not validly be provided by state law* * * *." (Italics supplied.)

There is also involved the Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, §§ 1031 and 1035, the pertinent provisions of which are:

> "Section 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated.
> * * *"
>
> "Section 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:

> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *."

The Deputy Commissioner's Compensation Order and Award.

The Deputy Commissioner made awards to the other respondents under the Longshoremen's and Harbor Workers' Compensation Act (R. 10-18), accepting jurisdiction even though the decedent's death did not result "from an injury occurring upon the navigable waters of the United States (including any dry dock)" and even though recovery for the death through workmen's compensation proceedings could validly be provided by the State of Louisiana, and was provided for by the Louisiana Workmen's Compensation Act (R. S. 23:1035).

The District Court Decision.

No opinion was written by the District Court, but it merely granted summary judgment against the petitioner following two earlier decisions of the Circuit Court of Appeals for the Fifth Circuit (R. 115-16).

The Court of Appeals Opinion.

The Court of Appeals, whose opinion is reported in 201 F. 2d 437 (R. 125-7), also followed its two earlier decisions and, one judge dissenting, affirmed the summary judgment of the District Court.

The dissenting judge stated his reasons for his dissent, namely, that the accident occurred "over dry land some four hundred feet from the river's edge" and, since "Congress made clear its purpose to permit state compensation protection whenever possible", the Longshoremen's and

Harbor Workers' Compensation Act cannot apply on land, "the natural habitat of the state compensation acts."

The majority opinion merely reaffirmed that Court's earlier decisions in *Continental Casualty Company* v. *Lawson*, 64 F. 2d 802 (a 2-to-1 decision), and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, and its reasons must be obtained from its opinions in those cases where it held (1) that the words "any dry dock" in the Act include a marine railway (even on land), (2) that Congress had power, and intended, to cover accidents on a marine railway, and (3) that Congress exercised exclusive jurisdiction over such cases, thus superseding any state compensation laws.

Prior to the Longshoremen's and Harbor Workers' Compensation Act accidents ashore on marine railways were matters within the state law, and the Court apparently ignored the fact that that Act was intended to "permit state compensation protection whenever possible" (*Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3) and excludes "any remedy against the employer for injuries inflicted ashore" (*Swanson* v. *Marra Bros.*, 328 U. S. 1, 7). It held that Congress could make the Act applicable to such accidents, and therefore it did so to the exclusion of any state compensation laws.

The Question Presented.

The question presented is solely one of law, i.e., whether the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 et seq., or the Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, § 1035, is applicable to injuries to, or death of, an employee doing cleaning work on a barge after it has been hauled out of a river on the cradle of a marine railway and is at rest on land some 400 feet from the river's edge. The determination of this question depends on

A. Whether such an accident (1) occurs "upon the navigable waters of the United States (including any dry dock)," and (2) recovery for it "through workmen's compensation proceedings may not validly be provided by state law." Both these conditions precedent are stated in the Longshoremen's and Harbor Workers' Compensation Act to be necessary to jurisdiction under it.

B. Whether such an accident is within the constitutional grant of exclusive admiralty jurisdiction. Constitution, Article III, § 2.

C. Whether Congress could make the Longshoremen's and Harbor Workers' Compensation Act apply to such an accident; and, if so, whether the Act does apply to all accidents to which Congress could extend it, notwithstanding it expressly provides that it covers "only" where state law cannot validly provide a compensation recovery.

Jurisdiction.

1. The date of the decision and judgment of the Court of Appeals for the Fifth Circuit is January 28, 1953.

2. This is a proceeding under § 921(b) of the United States Code, Title 33; with jurisdiction of this Court granted by Article III, § 2, of the Constitution of the United States.

3. The jurisdiction of this Court to review this case on a writ of certiorari is invoked under 28 U. S. C. § 1254.

Reasons Relied on for the Allowance of the Writ.

1. The decision below is untenable on the jurisdictional requirements of the Longshoremen's and Harbor Workers' Act, and in conflict with the construction of that Act by this

Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries*, 317 U. S. 249; and *Swanson* v. *Marra Bros.*, 328 U. S. 1.

2. The decision below is contrary to, and in conflict with, the decision of the Circuit Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 and decisions of District Courts in other circuits, which will be referred to in the brief in support of this petition.

3. The decision below decides an important question of local law in a way in conflict with the Louisiana State statute.

4. The decision below would allow an exercise of jurisdiction to award compensation contrary to law, and without statutory authority.

5. The decision below imposes on petitioner a liability not authorized by law which amounts to the taking of property without due process of law.

6. The decision below has so far sanctioned the Deputy Commissioner's usurpation of unauthorized power and jurisdiction as to call for the exercise of this Court's power of supervision.

The legal issue involved is of great general importance and should be settled to the end that the application of the Longshoremen's and Harbor Workers' Compensation Act will be uniformly applied throughout the country, and the various states will understand the Federal limitations upon their own workmen's compensation statutes. The decision below is in conflict with decisions in other circuits, whereas there should be a uniform application of this Federal Act in all circuits, which can only be accomplished by this Court in the exercise of its power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 28, 1953, to the end that they may be reversed by this Honorable Court; and that your petitioner may have such other and further relief as may be just and proper in the premises.

AVONDALE MARINE WAYS, INC.

By FRANK A. BULL and
ASHTON PHELPS
Counsel

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Facts.

A statement of the facts and the legal question involved, the statutes involved, the decisions and opinion below, and the jurisdiction in the matter have been set out in the petition, and, in the interest of brevity, they will not be repeated in this brief.

II.

Specification of Errors.

The Court of Appeals erred in the following respects:

1. In holding that a marine railway is a dry dock within the intent and meaning of the Longshoremen's and Harbor Workers' Compensation Act (herein called the Longshoremen's Act),

2. In holding that the Longshoremen's Act applies to an accident ashore on a marine railway, regardless of whether the State of Louisiana could otherwise validly provide a recovery through compensation proceedings.

3. In holding that the Louisiana Workmen's Compensation Act, which expressly covers work on "vessels, boats and other water craft," cannot apply to the accident involved.

4. In misconstruing the express language of the Longshoremen's Act, and holding that it extends the right to Federal compensation to accidents ashore because it was within the power of Congress to do so.

5. In holding that Congress intended, contrary to its expressed intention and to the intention disclosed by the Act itself, to cover accidents ashore on marine railways.

6. In holding that the Longshoremen's Act determines the validity of state compensation acts and their applicability to accidents ashore on a marine railway.

7. In sanctioning the Deputy Commissioner's assumption of jurisdiction, without statutory authority.

8. In taking property without due process of law.

III.

Argument.

The Court of Appeals followed its earlier decision in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, in which the majority held that it was within the power of Congress to grant compensation to employees working ashore on a marine railway, and consequently the Longshoremen's Act covers such employees, to the exclusion of any state compensation law; and that the words "any dry dock" in the Longshoremen's Act were intended to include a marine railway. As the whole theory of the Court below is disclosed in that decision, for the sake of brevity and to avoid unnecessary repetition of court opinions, we will cover the subject generally, rather than under separate points.

Since the *Lawson* decision, this Court has stated that the Longshoremen's Act does not apply to accidents other than those within the exclusive admiralty and maritime jurisdiction, which are beyond the reach of the states, *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 249-50, and that it left compensation remedies to the states whenever possible, *Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3; and in *Swanson* v. *Marra Bros.*,

328 U. S. 1, 7, this Court said the Longshoremen's Act is restricted to injuries on navigable waters and "excludes from its own terms * * * any remedies against the employer for injuries inflicted on shore," leaving such cases to "the remedies afforded by the local law," and "permits recovery against the employer for injuries inflicted by land torts" under state compensation acts.

State compensation acts were first adopted about 1911, and the first important case decided by this Court on the applicability of a state compensation statute to a maritime personal injury was *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, where it was held in 1917 that an accident occurring on navigable water is within the admiralty jurisdiction and consequently a state compensation statute could not apply to it. That case has been followed ever since, except in some cases, hereinafter cited, in which a state compensation law was held to apply even to accidents on navigable waters if the work being performed was of merely local concern. In *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, the injury occurred on a partially completed vessel in navigable water and this Court held that, although the accident was within the general admiralty jurisdiction, a state compensation act providing an exclusive remedy abrogated the admiralty jurisdiction which otherwise would exist.

The Longshoremen's Act was enacted in 1927 and provided for compensation "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." It would seem evident from this language that Congress intentionally imposed two conditions precedent to the exercise of jurisdiction under that Act.

The first case we know of involving a marine railway and the Longshoremen's Act is *Colonna's Shipyard* v. *Lowe*

(E. D. Va., 1927), 22 F. 2d 843, in which it was held that the Act is applicable only if compensation cannot be provided by state law; and that a compensation remedy for an injury on a vessel hauled out of the water onto dry land by a marine railway can validly be provided by state law.

The next marine railway case was *Giske* v. *Austrem and Sandstrom*, decided by the Superior Court of Washington in 1931, but apparently reported only in 1931 A. M. C. 1200. There a man injured on a vessel on a marine railway sued his employer at law, and the Court granted a motion to strike out an allegation that he elected to sue under the Jones Act, saying:

> "If this injury had occurred while the vessel was in a floating dry dock, admiralty jurisdiction would attach. (Citing cases.) And it is clear that that jurisdiction would attach if the vessel were in a graving dock, for in such a dock the vessel is floated in, and the water is merely temporarily withdrawn. Such a dock is within the ebb and flow of the tide.
>
> "• • •
>
> "It is clear therefrom that the Butler decision is grounded upon the fact that the interior of a graving dock is in navigable water, in other words, within the flow of the tides. Gates and pumps will not shut out jurisdiction.
>
> "The very reasoning of the learned judges in the Butler case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place" (pp. 1201-2).

Next came *Continental Casualty Co.* v. *Lawson* (D. C. Fla., 1932), 2 F. Supp. 459, and *Vesta Coal Co.* v. *Norton*, decided by a Pennsylvania District Court, but apparently unreported except as quoted in the appeal, *Norton* v. *Vesta Coal Co.* (C. C. A. 3rd), 63 F. 2d 165. In the former case

a marine railway was held to be included in the words "any dry dock" as used in the Longshoremen's Act. In the latter case, the holding was to the contrary, that is, that an injury ashore on a marine railway was not within the Longshoremen's Act, as it was not on navigable water and recovery could be provided by a state compensation statute.

The District Court decision in the *Norton* case was affirmed in January, 1933, in a 2-to-1 decision, the Circuit Court of Appeals for the Third Circuit saying:

> "* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation. * * * With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it means a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others." 63 F. 2d at page 166.

The contrary decision of the Florida District Court in the *Lawson* case was affirmed on appeal (insofar as the question here involved is concerned) in March, 1933, in a 2-to-1 decision, the majority opinion stating:

> "It was within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graving dry docks * * *." 64 F. 2d at page 804.
>
> "State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the Act of 1927 must be taken into consideration and given effect in determining whether under Section 3 (33 U. S. C. A. § 903) thereof the compensation laws of the states are valid

> and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive juirisdiction. In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graving docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. * * * The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work." 64 F. 2d at page 805.

We submit that the question is not whether Congress could have extended the Longshoremen's Act to cover injuries on marine railways, but rather whether it did so or even intended to do so; and this Court has agreed with that interpretation in decisions which we will refer to shortly. The Circuit Court of Appeals for the Fourth Circuit said, in *United States Casualty Co.* v. *Taylor* (1933), 64 F. 2d 521, 523-4:

> "We are not concerned with the power of Congress to include within the scheme of a federal compensation law the kind of employment involved in this case, unless it appears that it was the intention of Congress to cover it within the terms of the act. * * * Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * * It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirement of uniformity in matters of admiralty and maritime jurisdiction is observed."

In *Crowell* v. *Benson*, 285 U. S. 22, 55, this Court said:

> "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

The Court below conceded that the Longshoremen's Act and state compensation laws "are mutually exclusive of each other," but then proceeded to say that it was not the intent of Congress to exclude employees repairing a vessel on a marine railway (ashore), although it did intend to exclude repairmen or stevedores on a pier alongside a vessel in navigable waters. We are unable to agree, except to the mutual exclusiveness of the respective statutes. "If the cause of action arose upon the land, the state law is applicable." *T. Smith & Son* v. *Taylor*, 276 U. S. 179, 181.

The underlying reason for the majority decision in the *Lawson* case appears to be that dry docks and marine railways are used for repairing vessels, and therefore Congress must have intended to include marine railways in the words "any dry dock." That clearly was not the intention of Congress because it expressly provided that the Act covered "only" accidents on navigable waters which state compensation statutes could not provide for, and vessels on dry docks (whether floating or graving) had uniformly been held to be on navigable waters. Vessels are floated into and out of dry docks, but a vessel cannot be floated onto the shore above high water mark, and it was never held until the *Lawson* case that an accident on a vessel ashore above high water was within the exclusive admiralty jurisdiction. Indeed, such accidents were validly covered by the state law before there was any Federal compensation statute.

That dry docks and marine railways are used for the same general purpose would seem beside the point except

when dealing with maritime contract rights. Piers and lighters are both used to load and discharge vessels but it has uniformly been held that an accident to a stevedore on a lighter is within the admiralty jurisdiction whereas an accident to the same stevedore on a pier is within the state jurisdiction.

The Congressional intention and purposes in enacting the Longshoremen's Act is disclosed in the Senate Committee report cited by this Court in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U. S. at page 249. Nowhere can an intention be found to include marine railways in the words "any dry dock." Congress has recognized a difference between a dry dock and a marine railway, as is clear from the Maritime Lien provision of the Ship Mortgage Act, 1920, 46 U. S. C. § 971, 41 Stat. 1005, which provides:

> "Any person furnishing repairs, * * * use of dry dock or marine railway * * * to any vessel * * * shall have a maritime lien on the vessel * * *."

The lien statute deals with rights under maritime contracts within the admiralty jurisdiction, but when dealing with non-contract matters in the Longshoremen's Act Congress did not specify "any dry dock or marine railway."

This Court granted certiorari, on petition of the United States Attorney General, in the *Norton* case, *supra,* 63 F. 2d 165, which had held that accidents on marine railways were not covered by the Longshoremen's Act (290 U. S. 613); but in 1934 (subsequent to the Circuit Court of Appeals decision in the *Lawson* case) the writ was dismissed, 291 U. S. 641, in a per curiam memorandum decision as follows:

> "As it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

The Department of Justice thus appears to have come to the conclusion that an accident ashore on a marine railway was not covered by the Longshoremen's Act, disagreeing with the majority decision in the *Lawson* case.

In 1939 the court below, in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 734, followed the decision in the earlier *Lawson* case saying, "We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways."

In 1937 the Supreme Court of Washington held that the State Compensation law applied to an accident on a marine railway track. *Rohlfs* v. *Department of Labor and Industries*, 190 Wash. 566. There the Court said:

> "A marine railway * * * is not like a floating dock or a dry dock into which a vessel which needs repair floats on the surface of the water. Upon a marine railway the boat is hauled, by some power other than its own and not connected with navigation, out of the water and to a point upon the land, * * *. As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and back again. While on the ship, he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law.
>
> "Respondent was working on land, not on the water; * * *."

Since the decisions in the *Lawson*, *Norton* and *Rohlfs* cases, and the Government's concession that the *Norton* case decision was "correct," the purpose and coverage of the Longshoremen's Act has been stated by this Court in two important cases. In *Parker* v. *Motor Boat Sales, Inc.*, *supra*, 314 U. S. 244, decided in December, 1941, it held an accidental death of a shore employee on a boat on a navigable river was within the Longshoremen's Act because

it was within the admiralty and maritime jurisdiction, and said:

> "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' can not be read in a manner that would defeat this purpose* • • •.
>
> "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to *correct a gap* made plain by decisions of this Court. We believe that *there is only one interpretation* of the proviso in Section 3(a) *which would accord with the aim of Congress;* the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U. S. at pages 249-50. (Italics supplied.)

In *Davis* v. *Department of Labor and Industries, supra,* 317 U. S. 249, decided in December, 1942, this Court reversed a decision of the Supreme Court of Washington that the state compensation law did not apply to the drowning of a worker in a navigable river, saying:

> "March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, • • •. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable *only* 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'" 317 U. S. at pages 252-3. (Italics supplied.)

> "The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * * In our decision in Parker v. Motor Boat Sales, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction." 317 U. S. at pages 255-6.

The theory of the decision below is that Congress intended the Longshoremen's Act to cover any accidents which Congress had power to provide for, notwithstanding this Court said in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U. S. 244, that the Longshoremen's Act was intended, and should be interpreted, to provide compensation *only* where the states could not; and in *Davis* v. *Department of Labor and Industries, supra,* 317 U. S. at pages 252-3, this Court said that the purpose of Congress was to *permit state compensation whenever possible.* In other words, this Court has said that state compensation statutes would apply if they could, and the court below held that a state compensation law could not apply since, and because of, the enactment of the Longshoremen's Act. These are contradictory rulings.

Swanson v. *Marra Bros.* (1946), 328 U. S. 1, is not directly in point because it involved a longshoreman's suit under the Jones Act, but this Court clearly disclosed its interpretation of the Longshoremen's Act, in the following:

> "By § 903(a)(1) recovery may be had under the Act only 'if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law.'" (p. 6).
>
> "The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expressed *doubt as to the constitutional power of Congress to give recovery to such employees injured on shore,* * * *" (p. 7). (Italics supplied.)

> "But *since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms* * * * *any remedies against the employer for injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by *the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees* who are not members of the crew of a vessel" (p. 7). (Italics supplied.)

As we understand the decisions in the *Parker*, *Davis* and *Swanson* cases, *supra*, this Court considers the Longshoremen's Act as not applying to injuries ashore because state law can validly afford compensation relief; and that view is clearly disclosed by the expressed intention of Congress and the history of Federal compensation legislation, which was pointed out by this Court in the *Davis* case, *supra*, 317 U. S. at page 252.

The intention of Congress to cover only injuries to which the State Compensation Acts could not validly apply is stated in the Senate Committee Report No. 973 on Senate Bill 3170, 69th Cong., 1st Sess. (cited in the *Davis* case and quoted in the *Parker* case), where it was said (p. 16):

> "Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are *necessary to limit* the operation of the bill to the very persons who are intended to be covered by it." (Italics supplied.)

As pointed out by this Court, Congress enacted a statute to apply only to those maritime workers (except seamen) whose injuries were constitutionally within the exclusive admiralty jurisdiction. It is clearly disclosed by the Senate Committee Report, and by the express language of the Longshoremen's Act, that the purpose of that Act

was to cover *only* injuries which the Constitution would not allow the states to cover.

Even some injuries on navigable water are held not within the exclusive admiralty jurisdiction and therefore subject to state laws, because they are of mere "local concern." *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Millers' Underwriters* v. *Braud*, 270 U. S. 59; *Parker* v. *Motor Boat Sales, Inc.*, *supra*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries*, *supra*, 317 U. S. 249; *Moore's Case*, 323 Mass. 162, affd. sub. nom. *Bethlehem Steel Co.* v. *Moore*, 335 U. S. 874; *Baskin* v. *Industrial Acc. Comm.*, 97 Cal. App. 2d 257, affd. 340 U. S. 886.

This has given rise to what has been referred to as the "twilight zone" to denote injuries occurring on navigable waters for which the states may or may not afford compensation relief, depending on the particular facts of each case. It has led to a great deal of confusion, as evidenced by the case of *Baskin* v. *Industrial Acc. Comm.*, 89 Cal. App. 2d 632, where a shipyard employee, who usually worked ashore, fell into a hold of a ship in navigable waters. The California Compensation Commission denied compensation, and the California Court affirmed on the ground that the accident, occurring on navigable water, was exclusively within the Federal jurisdiction. Rehearing was denied by the State Supreme Court, and this Court granted certiorari and vacated the judgment below and remanded the case to the state court for reconsideration. 338 U. S. 854. The state court then reversed itself and directed the Commissioner to hear and determine the claim, *Baskin* v. *Industrial Acc. Comm.*, 97 Cal. App. 2d 257, and that decision was affirmed by this Court in November, 1950, without opinion. 340 U. S. 886.

The remand and reversal were based upon the decisions in the *Davis* case, *supra*, 317 U. S. 249, and in *Bethlehem Steel Co.* v. *Moore*, *supra*, 335 U. S. 874, affirming *Moore's*

case, *supra*, 323 Mass. 162, which involved injuries on a vessel in a dry dock floating on navigable water.

The characterization "twilight zone" is applied to certain accidents *on navigable waters*, but it has never been applied to injuries ashore. The Longshoremen's Act applies *only* to injuries on navigable waters *and only* if compensation may not validly be provided by state law. As the Circuit Court of Appeals for the First Circuit said in *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. 2d 237, 239:

> "*Both clauses* must be read together and, *taken together, they describe and limit the maritime field in which the Act was first made operative*, automatically adjusting what the Supreme Court has referred to as the somewhat 'shadowy limits' of that field to any situation." (Italics supplied.)

In *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332, 333, the Circuit Court of Appeals for the Second Circuit said:

> "From the foregoing it is apparent that to come within the coverage of the statute the injured employee must satisfy three conditions: (1) in the course of his employment he must sustain *injury upon the navigable waters* of the United States; (2) his employment must be maritime; and (3) his injury must occur *under circumstances which preclude state compensation* laws from providing for recovery." (Italics supplied.)

In the "twilight zone" cases one of the two necessary conditions is always present, i.e., a personal injury or death on navigable water, but the Longshoremen's Act applies only if the state law cannot. If the injury occurs on navigable water (and a dry dock is on navigable water, *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *Bethlehem Steel Co.* v. *Moore*, *supra*, 335 U. S. 874), state laws may

apply if not interfering with the general admiralty jurisdiction. *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249; *Baskin* v. *Industrial Acc. Comm., supra*, 97 Cal. App. 2d 257, affd. 340 U. S. 886; *Millers' Underwriters* v. *Braud, supra*, 270 U. S. 59; *Moore's Case, supra*, 323 Mass. 162; *Grant Smith-Porter Ship Co.* v. *Rohde, supra*, 257 U. S. 469.

In the case at bar the deaths did not occur on navigable water nor on a dry dock, which is considered on navigable water. That they occurred on a barge is immaterial as pointed out by this Court in *The Plymouth*, 3 Wall. (70 U. S.) at pages 35-6 and in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, at pages 59-60:

> "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters."

The decision below conflicts with opinions of this Court heretofore referred to (including the *Parker*, *Davis* and *Swanson* cases and *Crowell* v. *Benson, supra*); is contrary to the decisions of the Circuit Court of Appeals for the Third Circuit (*Norton* v. *Vesta Coal Co., supra*, 63 F. 2d 165), the District Court in Virginia (*Colonna's Shipyard* v. *Lowe, supra*, 22 F. 2d 843), and The Supreme Court of Washington (*Rohlfe* v. *Department of Labor and Industries, supra*, 190 Wash. 566; *Giske* v. *Austrem, supra*, 1931 A. M. C. 1200); and it construes the Longshoremen's Act contrary to the decisions of this Court, the Circuit Court of Appeals for the First Circuit (*Royal Indemnity Co.* v. *Puerto Rico Cement Corp., supra*, 142 F. 2d 237), the Circuit Court of Appeals for the Second Circuit (*New Amsterdam Cas. Co.* v. *McManigal, supra*, 87 F. 2d 332) and the Circuit Court of Appeals for the Fourth Circuit (*United States Casualty Co.* v. *Taylor*, 64 F. 2d 521).

Conclusion.

A marine railway not being a dry dock, an injury or death on a vessel ashore on it is not within the admiralty jurisdiction and the State of Louisiana can validly provide compensation; and the Deputy Commissioner, whose jurisdiction exists only under, and by virtue of, the Longshoremen's Act had no legal authority to make a compensation award against petitioner and deprive it of its property in the matter. Therefore, it is respectfully submitted that a writ of certiorari should be granted so that this Honorable Court may review the decision of the Court of Appeals for the Fifth Circuit because of the importance of the legal issue involved, and to the end that the Longshoremen's Act may be uniformly applied and the holdings of courts in the various circuits, as well as the state courts, may be in accord with the decisions of this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC.,
Petitioner,

against

JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, et al.,
Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

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OCTOBER TERM, 1953—No. 44

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JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, et al,
Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

This is a review, on writ of certiorari, of a decision of the United States Court of Appeals for the 5th Circuit holding that an accident to two employees of the petitioner on a marine railway on dry land was within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act rather than the Louisiana Workmen's Compensation Act (R. 87-9). The matter involves only questions of law.

I.

The opinions of the courts below.

Two awards were made by the respondent Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act (R. 7-12), and complaints were filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, to enjoin the awards and to have them annulled and set aside (R. 2-6), and on motion of the Deputy Commissioner the two cases were

consolidated because they involved common questions of law and fact (R. 12-13). The District Court (WRIGHT, D. J.) granted summary judgment on the motion of the Deputy Commissioner and dismissed the suits (R. 13-16, 85-6). No opinion was written by the District Court, but the judgment was based on two earlier decisions of the Circuit Court of Appeals for the 5th Circuit (R. 85).

An appeal was taken by petitioner (R. 86), and the two cases were consolidated for briefing and hearing by the appellate court, the record in only one of them to be printed (R. 1-2). The Court of Appeals for the 5th Circuit, in a two to one decision, affirmed the District Court, also following its two earlier decisions (R. 87-9). The Court of Appeals opinion is reported in 201 F. 2d 437.

II.

Jurisdiction.

These cases are under a federal statute, the Longshoremen's and Harbor Workers' Compensation Act, Section 3(a) being involved, 33 U. S. C. § 903, 44 Stat. 1426. The jurisdiction of this Court was invoked by a petition for a writ of certiorari to the Court of Appeals for the 5th Circuit, which petition was granted on June 8, 1953 (R. 92). 345 U. S. 974.

III.

Statement of the case.

The only questions involved in this matter are jurisdictional (questions of law), i. e., whether the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, or the Louisiana Workmen's Compensation Act, Title 23, Louisiana Revised Statutes, § 1021, *et seq.*, is applicable

to injuries, or death, of an employee working on a barge which has been hauled out of a river on the cradle of a marine railway and is at rest on land above high water some 350 feet from a river's edge.

The facts are simple and were either stipulated or uncontroverted (R. 21-7, 87, 201 F. 2d 438, note 2). Thus, there are no disputed facts which might affect the question of law presented.

On July 20, 1951, Arthur Campbell and Joseph D'Arensbourg, both employees of petitioner, were cleaning a barge at petitioner's marine repair yard at Avondale, Louisiana, when a flash explosion occurred, causing their deaths (R. 7-8, 21-3, 87). The barge, named Walter Russ, had been hauled out of the Mississippi River on a marine railway some hours before, and at the time of the accident was some distance from the water (R. 22, 87).

The widows of the two employees, on their own behalfs and on behalf of their respective minor children, filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 7, 18, 28-30, 34, 87, 90-1) and, over petitioner's objections, awards were made by the Deputy Commissioner on both claims (R. 7, 11-14). Because the two claims involved identical facts, except for the names of decedents and the claimed beneficiaries, petitioner's complaints directed against the awards were consolidated for briefing and hearing on the record in only one case, the other to abide the final decision of this Court (R. 1-2, 90-1). Thus, the matter before this Court involves two separate claims which are identical in so far as the questions of law are involved.

The facts heretofore recited were stipulated, but in addition petitioner introduced the oral testimony of two witnesses with respect to the marine railway, which evidence has not been controverted. Henry Z. Carter, petitioner's general manager, testified that the marine railway at petitioner's repair yard had formerly been used as a

railroad ferry approach, but after petitioner's acquisition of the property it had been used for putting new construction into the water and removing vessels from the water for repair purposes (R. 47-8). The barge was in a position where the workmen could walk on the earth all around it, and no part of it or of the cradle on which it rested was overhanging the water (R. 52). The witness arrived at the scene of the accident about fifteen minutes after it occurred (R. 42), and he identified three photographs of the part of the marine railway on which the barge had been at rest at the time of the accident (R. 43-5). Reproductions of these photographs appear in the record on pages 84A, 84B, and 84C.

Mr. Arthur Grant, a mechanical engineer and a marine surveyor of experience, also testified without contradiction to the former use of the marine railway (R. 61-3) and the uses made of it by the petitioner (R. 64-5). He and Mr. Carter explained the difference between a marine railway and a drydock (R. 56-7, 66-9).

IV.

Specification of errors.

The Court of Appeals erred in the following respects:

1. In holding that the Longshoremen's and Harbor Workers' Compensation Act applies to an accident ashore on a marine railway regardless of whether the State of Louisiana could validly provide a recovery through compensation proceedings.

2. In holding that the Louisiana Workmen's Compensation Act, which expressly covers work on "vessels, boats and other water crafts", can not apply to the accident involved.

3. In holding that the Longshoremen's and Harbor Workers' Compensation Act determines the validity of state compensation Acts and their application to accidents ashore on a marine railway.

4. In misconstruing the express language of the Longshoremen's and Harbor Workers' Compensation Act, and holding that it extends the right to federal compensation to accidents ashore because it was within the power of Congress to do so.

5. In holding that Congress intended, contrary to its expressed intention and to the intention disclosed by the Act itself, to cover accidents ashore on marine railways.

6. In holding that a marine railway is a dry dock within the intent and meaning of the Longshoremen's and Harbor Workers' Compensation Act.

7. In sanctioning the Deputy Commissioner's assumption of jurisdiction, without statutory authority.

8. In taking property without due process of law.

ARGUMENT.

Summary of Argument.

In 1917, this Court held that a state compensation statute could not be applied to a stevedore's injury sustained on navigable waters. Subsequently, Congress made two attempts by legislation to make the state remedies applicable to such injuries; but that legislation was declared unconstitutional by this Court. Congress then enacted the Longshoremen's and Harbor Workers' Compensation Act (hereinafter called the Longshoremen's Act) to cover *only* those injured employees whom this Court had held could

not be provided for by state compensation laws. "Congress made clear its purpose to permit state compensation protection wherever possible." *Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3.

The Longshoremen's Act expressly covers *only if* disability or death results from an injury on navigable waters (including any dry dock), and *only if* recovery through workmen's compensation *may not* validly be provided by state law. The accident involved in the present case occurred 350 feet or more from any navigable water on a barge resting on a marine railway affixed to land above water level. The barge had not been floated to the place where it was on land, but had been pulled from the river by an engine ashore (R. 56-7), a method quite similar to having it bodily picked up by a huge crane and swung over onto the land.

The court below held (1) that a marine railway ashore above and away from any water is a dry dock within the intendment of the Longshoremen's Act, and (2) that Congress had the power to, and therefore did, provide for coverage of accidents on such a marine railway, to the exclusion of state workmen's compensation laws.

The fallacy in this reasoning is in assuming that Congress, contrary to its express language and to the holdings of this Court, intended to exercise unlimited power to create a federal jurisdiction, not given to it by the Constitution, which would oust the states of jurisdiction theretofore held by them. The court below also erred in holding that Congress intended by the words "including any dry dock" to mean also any marine railway, whereas Congress had shown by other legislation that it recognized a distinction between the two terms. In treating dry docks as on navigable water, Congress was merely following the decisions of this Court and others.

The Longshoremen's Act does not extend to accidents other than those which are within the exclusive admiralty

jurisdiction and therefore beyond the reach of the states, *Parker* v. *Motor Boat Sales*, 314 U. S. 244, and it left workmen's compensation remedies to the states wherever possible, *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249. In *Swanson* v. *Marra Bros.*, 328 U. S. 1, this Court pointed out that the Act is restricted to injuries on navigable waters and "excludes from its own terms * * * any remedy against the employer for injuries inflicted ashore", leaving such cases to "the remedies afforded by the local law", and that it "permits recovery against the employer for injuries inflicted by land torts" under state compensation laws.

FIRST POINT.

The Louisiana Workmen's Compensation Act covers the accident, and the Longshoremen's Act did not oust the state of jurisdiction or assume jurisdition of accidents ashore.

As previously pointed out, there are no disputed facts in this case, and there is presented only questions of law involving the interpretation and application of § 3(a) of the Longshoremen's Act, 44 Stat. § 1426, 33 U. S. C. § 903(a), which provides:

> "Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but *only if* the disability or death results from an injury *occurring upon the navigable waters* of the United States (including any dry dock) and *if* recovery for the disability or death through workmen's compensation proceedings *may not validly* be provided by state law. * * *." (Italics supplied.)

The Longshoremen's Act was passed in 1927, but at that time there was in effect the Louisiana Workmen's

Compensation Act, Act 20 of 1914, § 1, 3 Dart's Statutes, § 4391(2), covering:

> "Every person performing services arising out of and incidental to his employment in the course of his employer's business or occupation in the following hazardous trades, businesses and occupations:
>
> "(a) The operation, construction, repair, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts,. . . ."

At the time of the accident involved the same coverage was contained in Title 23, Louisiana Revised Statutes of 1950, § 1035.

In 1917, while the Louisiana statute was in effect but before the Longshoremen's Act was passed, this Court held in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 214-5, that an accident occurring on navigable water is within the admiralty and maritime jurisdiction and consequently within the paramount authority of Congress under Article III, § 2, of the Constitution. The course of federal legislation on the subject thereafter has been pointed out by this Court in the *Davis* case, *supra*, 317 U. S. at page 252, as follows:

> ". . . Congress on October 6, 1917, five months after the Jensen decision, passed an Act attempting to give such injured persons the 'rights and remedies under the workmen's compensation law of any State.' 40 Stat. 395, 28 U. S. C. A. §§ 41(3), 371(3). May 17, 1920, this Court declared the Act unconstitutional. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149. June 10, 1922, 42 Stat. 634, 28 U. S. C. A. §§ 41(3), 371 (3), Congress made another effort to permit state compensation laws to protect these waterfront employees, but this second effort was also held invalid. State of Washington v. W. C. Dawson & Co., 264 U. S. 219. March 4, 1927, came the Federal Longshoremen's and Harbor Workers'

Act, 33 U. S. C. § 901 et seq. 33 U. S. C. A. § 901 et seq. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Italics supplied.)

The coverage section of the Longshoremen's Act, § 3(a), expressly provides two conditions precedent, (1) the accident must have occurred on navigable water (including any dry dock), and (2) it must be one for which workmen's compensation recovery can not validly be provided by state law. Neither of these conditions precedent is present in the case before this Court.

The first officially reported case involving a marine railway and the Longshoremen's Act was *Colonna's Shipyard* v. *Lowe*, 22 F. 2d 843, decided in the Eastern District of Virginia in 1927, in which it was held that the Act is applicable only if compensation can not be provided by state law; and that a compensation remedy for an injury on a vessel which has been hauled out of the water onto the land by a marine railway can be provided by state law.

The next marine railway case was *Giske* v. *Austrem and Sandstrom*, decided by the Supreme Court of the State of Washington in 1931 but apparently reported only in 1931 American Maritime Cases 1200. There a man injured while painting a vessel on a marine railway brought an action at law against his employer, and the court granted a motion to strike out an allegation that plaintiff elected to sue under the Jones Act (46 U. S. C. § 688), saying:

> "If this injury had occurred while the vessel was in a floating dry dock, admiralty jurisdiction would attach (citing cases). And it is clear that jurisdiction would attach if the vessel were in a graving dock, for in such a dock the vessel is floated in, and

the water is merely temporarily withdrawn. Such a dock is within the ebb and flow of the tide.

"* * *

"The very reasoning of the learned judges in the *Butler* case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place."

Next came *Continental Casualty Co.* v. *Lawson*, 2 F. Supp. 459, in the District Court of Florida in 1932, and *Vesta Coal Co.* v. *Norton* in a Pennsylvania District Court, but apparently unreported except as quoted in the appeal, *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165. In the former case a marine railway was held to be included in the term "any dry dock" as used in the Longshoremen's Act. In the latter, the holding was to the contrary, that is, that an injury ashore on a marine railway was not within the Act as it would not be on navigable water and recovery could be provided by a state compensation statute.

The District Court holding in the *Norton* case was affirmed in January, 1933, in a 2-to-1 decision, the Circuit Court of Appeals for the 3rd Circuit saying, 63 F. 2d at page 166:

"* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation. * * *. With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others."

The contrary decision of the Florida District Court in the *Lawson* case was approved by the Circuit Court of

Appeals for the 5th Circuit (in so far as the question here involved is concerned) in March, 1933, in a 2-to-1 decision, the majority opinion stating, 64 F. 2d 802, at pages 804-5:

> "It is within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graven dry docks. * * * State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the Act of 1927 must be taken into consideration and given effec in determining whether under Section 3 (33 U. S. C. A. Sec. 903) thereof the compensation laws of the states are valid and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction. In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. * * *. The use of the phrase 'including any dry dock' in section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work. * * *."

It is our contention that the question is not whether Congress could have extended the Longshoremen's Act to cover injuries on marine railways, but rather whether it did so or even intended to do so; and this Court has agreed with that contention in subsequent decisions which we will refer to shortly. The Circuit Court of Appeals for the 4th Circuit said, in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, 523-4, cert. den. 290 U. S. 639:

"We are not concerned with the power of Congress to include within the scheme of a federal compensation law the kind of employment involved in this case, unless it appears that it was the intention of Congress to cover it within the terms of the act * * *. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *. It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirement of uniformity in matters of admiralty and maritime jurisdiction is observed."

In *Crowell* v. *Benson*, 285 U. S. 22, 55, this Court said:

"In amending and revising the maritime law, the Congress can not reached beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

In the *Lawson* case, *supra*, 64 F. 2d 802, the court conceded that the Longshoremen's Act and state compensation laws "are mutually exclusive of each other", but then proceeded to say that state laws could not apply to matters over which Congress had exercised its exclusive jurisdiction, and that it was not the intent of Congress to exclude from the Longshoremen's Act employees repairing a vessel on a marine railway, although it did intend to exclude stevedores on a pier alongside a vessel in navigable waters.

The majority opinion assumed an answer to the question for determination by stating that a state compensation statute would not apply to a matter over which Congress

had exercised its exclusive jurisdiction. The question is not what Congress could do, but what it intended and undertook to do. Congress did not state in the statute itself that it was exercising jurisdiction over accidents ashore on marine railways. Its intention and purpose in enacting the statute is disclosed in the Senate Committee report cited by this Court in *Parker* v. *Motor Boat Sales*, *supra*, 314 U. S. 244, at page 249.

This Court, on petition of the United States Attorney General, granted certiorari in the *Norton* case, *supra*, 63 F. 2d 165, which had held that accidents on marine railways were not covered by the Longshoremen's Act (290 U. S. 613); but in 1934 (subsequent to the decision of the court below in the *Lawson* case) the writ was dismissed, 291 U. S. 641, on a per curiam memorandum decision as follows:

> "As it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

The Department of Justice thus appears to have come to the conclusion that an accident ashore on a marine railway was not covered by the Longshoremen's Act, disagreeing with the majority decision in the *Lawson* case, *supra*, 64 F. 2d 802.

In 1937 the Supreme Court of Washington held that the state compensation law applied to a workman injured on a gasboat which was on a marine railway track, having been hauled from the water for the purpose of repairs. *Rohlfs* v. *Department of Labor & Industries*, 190 Wash. 566. There the court said:

> "As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and

back again. While on the ship, he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law."

In 1939 the court below, in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, followed its decision in the earlier *Lawson* case.

Since the decisions in the *Lawson* (64 F. 2d 802 and 101 F. 2d 732), *Norton* (63 F. 2d 165), and *Rohlfs* (190 Wash. 566) cases, and the Government's concession (291 U. S. 641) that the *Norton* case decision was "correct", the purpose and coverage of the Longshoremen's Act has been passed upon by this Court in two important cases. In *Parker* v. *Motor Boat Sales* (1941), *supra*, 314 U. S. 244, there was involved an accidental death to an employee who was primarily hired as a janitor and porter ashore but was injured while on a boat in a navigable river. The Deputy Commissioner made an award under the Longshoremen's Act; the District Court dismissed a complaint to enjoin enforcement of the award; and the Circuit Court of Appeals for the 4th Circuit reversed. This Court reversed the Circuit Court of Appeals and affirmed the District Court holding that the accident was within the Longshoremen's Act because it occurred on navigable water within the federal admiralty and maritime jurisdiction, and said:

> "In the report of the Senate Committee on the Judiciary accompanying the bill which was enacted as the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess. 16, this avowal of the Congressional purpose appears:
>
> "'If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation

can not, constitutionally, be enacted that will apply State laws to this occupation. (Citing the *Jensen* and other cases.)

"* * *

"There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' can not be read in a manner that would defeat this purpose.* * * *. "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to *correct a gap* made plain by decisions of this Court. We believe that *there is only one interpretation* of the proviso in Section 3(a) *which would accord with the aim of Congress;* the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U. S. 249-50. (Italics supplied.)

In *Davis* v. *Department of Labor and Industries* (1942), *supra*, 317 U. S. 249, this Court reversed a decision of the Supreme Court of Washington holding that the state compensation law did not apply to a structural steel worker who was drowned in a navigable river while working as an employee of a construction company in dismantling an abandoned draw bridge. The decedent had helped cut some of the steel from the bridge, which was placed on a barge to be moved away, and at the time of the accident was working on the barge examining the steel on it and, when necessary, cutting the pieces to proper lengths. The Washington statute expressly applied to all employees engaged in mari-

time occupations for whom no right or obligation existed under maritime laws. In holding the accident within the state compensation law, notwithstanding it occurred on navigable waters, this Court said:

> "A line of opinions of this Court beginning with Southern Pac. Co. v. Jensen * * * held that under some circumstances states could but under others could not, consistent with Article III, § 2, of the Federal Constitution, apply their compensation laws to maritime employees. State legislation was declared to be invalid only when it 'works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' * * *.
>
> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, * * *. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable *only* 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'
>
> "Harbor workers and longshoremen employed 'in whole or in part, upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. * * *" 317 U. S. 252-3.
>
> "The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * *. In our decision in Parker v. Motor Boat Sales, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction." 317 U. S. 255-6.

"Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this State enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute cannot be rested on so hazardous a factual foundation here any more than in the other cases cited." 317 U. S. 258. (Italics supplied.)

In May, 1944, the court below decided *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, which did not involve the issue presented in this case, as the accident happened on a barge in navigable water. However, after stating that "state compensation laws and this compensation law of Congress are mutually exclusive of each other", the court said:

"It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legislative decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principles of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and

> applied the 'local concern' doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them." pp. 483-4.

That case is not in point because the accident occurred on navigable water, but the court nevertheless referred to the statement in its majority opinion in the *Lawson* case, *supra*, (64 F. 2d 802) to the effect that Congress intended the Longshoremen's Act to cover any accidents which Congress had the power to provide for by a federal statute, notwithstanding this Court had said in *Parker* v. *Motor Boat Sales, supra* (314 U. S. at pages 249-50), that the Act was intended and should be interpreted to provide compensation *only* where the states could not; and in *Davis* v. *Department of Labor and Industries, supra* (317 U. S. at pages 252-3), this Court had said that the purpose of Congress was to *permit state compensation whenever possible.* In other words, this Court held that the state compensation statute would apply if it could, and the court below said a state compensation law could not apply if Congress *could* cover the matter by federal legislation. These are contradictory rulings.

Subsequently, and in 1946, this Court decided the case of *Swanson* v. *Marra Bros., supra*, 328 U. S. 1, which also is not directly in point because the question involved was the right of recovery of a longshoreman under the Jones Act. However, this Court clearly pointed out its interpretation of the Longshoremen's Act, in the following:

> "Congress enacted the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901, et seq., 33 U. S. C. A. § 901, et seq., which gave a remedy against employers by way of compensation for disability or death suffered on navigable waters by an employee not a 'master or member of a crew of any vessel.' * * *. By § 903(a)(1) recovery may be had under

the Act only 'if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law.'

"* * *

"We can hardly suppose that Congress, while explicitly denying a right of recovery under the Jones Act to maritime workers not members of a crew who are injured on board a vessel, either thought that the Jones Act extended to injuries inflicted on shore to employees not members of a crew, * * * or intended that there should be established for such workers injured on shore, by extension of the doctrine of the Haverty case, a right of recovery which it at the same time withdrew from such workers when injured on navigable waters. The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expressed *doubt as to the constitutional power of Congress to give recovery to such employees injured on shore*, saying 'These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in loading and unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States.'– Sen. Rep. No. 973, 69th Cong. 1st Sess. p. 16. * * *.

"We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case only such rights to compensation as are given by the Longshoremen's Act. But *since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms* and from the Jones Act *any remedies against the employer for injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which *this Court has often held permits recovery against the*

> *employer for injuries inflicted by land torts on his employees* who are not members of the crew of a vessel." 328 U. S. 6-7. (Italics supplied.)

As we understand the decisions in the *Parker* (314 U. S. 244), *Davis* (317 U. S. 249), and *Swanson* (328 U. S. 1) cases, *supra*, this Court does not consider the Longshoremen's Act as granting compensation remedies wherever Congress might have power to do so, but holds that it does not apply to any injuries ashore because state law can validly provide compensation relief; and that view is clearly disclosed by the expressed intention of Congress and the history of federal harbor workers' compensation legislation.

The intention of Congress to enact a federal compensation statute to cover only injuries to which the state compensation laws could not validly apply is disclosed by the Senate Committee Report No. 973 on Senate Bill 3170, 69th Cong., 1st Sess. (cited in the *Davis* case, *supra*, 317 U. S. at page 254, n. 4, and quoted in the *Parker* case, *supra*, 314 U. S. at page 249) as follows:

> "Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are *necessary to limit* the operation of the bill to the very persons who are intended to be covered by it." (Italics supplied.)

As heretofore pointed out, Congress tried by earlier Acts to make state compensation statutes apply to all maritime workers, but those Acts were held unconstitutional because they sought to give the states authority to provide compensation in matters which are within the exclusive admiralty jurisdiction. As a result Congress enacted its own compensation Act to apply *only* to injuries of maritime workers which under the *Jensen* case, *supra*, 244 U. S. 205, and other decisions, had been held to be within the exclusive admiralty jurisdiction (excepting only seamen).

As clearly disclosed by the cited Senate Committee Report and the express language of the Longshoremen's Act, the purpose of that Act was to cover only injuries on navigable water which the Constitution would not allow the states to cover. However, the courts have held that many injuries on navigable water which are of mere "local concern," and which will not work material prejudice to the maritime law, are not within the exclusive admiralty jurisdiction and therefore state laws can be applied to them. *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U. S. 469; *Millers' Underwriters* v. *Braud*, 270 U. S. 59; *Parker* v. *Motor Boat Sales, supra*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249; *Moore's Case*, 323 Mass. 162, aff'd. sub. nom. *Bethlehem Steel Co.* v. *Moore*, 335 U. S. 874; *Baskin* v. *Industrial Acc. Com.*, 97 Cal. App. 2d 257, aff'd. 340 U. S. 886.

This has given rise to a class of cases which come within what has been referred to as the "twilight zone" to denote injuries occurring on navigable waters for which the states may or may not afford compensation relief, depending on the particular facts of each case. This has lead to a great deal of confusion, as evidenced by the case of *Baskin* v. *Industrial Acc. Comm.*, 89 Cal. App. 2d 632, where a shipyard employee, whose work was ashore except when he was sent for short periods on ships being repaired, was injured when he was sent onto a ship in navigable waters and fell into a hold. The California State Compensation Commission dismissed an application for compensation, and a California court affirmed on the ground that the accident having occurred on navigable water was exclusively within the federal jurisdiction. Both a petition for rehearing and an application for a hearing in the State Supreme Court were denied. This Court granted certiorari and remanded the case to the California District Court of Appeals for reconsideration. 338 U. S. 854. The California court then reversed itself and annulled the com-

mission's order with directions to proceed with hearing and determining the claim. *Baskin* v. *Industrial Acc. Comm., supra*, 97 Cal. App. 2d 257. This last decision was affirmed in November, 1950, by this Court, without opinion. 340 U. S. 886.

The reversal, after remand by this Court, was based upon the decisions in the *Davis* case, *supra*, 317 U. S. 249, and in *Bethlehem Steel Co.* v. *Moore, supra*, 335 U. S. 874, affirming *Moore's* case, *supra*, 323 Mass. 162. *Moore's* case involved injuries sustained in a dry dock floating on navigable water and the court sustained an award of compensation under the state compensation statute. Both the *Moore* case and the *Baskin* case involved injuries occurring on navigable water, but they were considered within the "twilight zone" where the state was competent to give compensation relief.

The characterization "twilight zone" is applied to certain accidents on navigable waters, but *it has never been applied to personal injuries sustained ashore.* The Longshoremen's Act applies only to injuries "occurring upon the navigable waters" and only "if recovery * * * through workmen's compensation proceedings may not validly be provided by state law". Both of these conditions precedent are necessary to Longshoremen's Act coverage. As the Circuit Court of Appeals for the 1st Circuit said in *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. 2d 237, 238, cert. den. 323 U. S. 756:

> "The clause permitting recovery only where compensation 'may not validly be provided by state law' *is not an independent condition, but a limitation upon the previous clause referring to navigable waters,* necessary in view of the above decisions, and because not all injuries upon navigable waters are exclusively within federal jurisdiction (citing cases).
>
> "*Both clauses* must be read together and, *taken together they describe and limit the maritime field in which the Act was first made operative,* automatic-

> ally adjusting what the Supreme Court has referred to as the somewhat 'shadowy limits' of that field to any situation." (Italics supplied.)

In *New Amsterdam Cas. Co.* v. *McManigal*, 87 F. 2d 332, 333, the Circuit Court of Appeals for the 2nd Circuit said:

> "From the foregoing it is apparent that to come within the coverage of the statute the injured employee must satisfy three conditions:
>
> (1) In the course of his employment he must sustain injury upon the navigable waters of the United States; (2) his employment must be maritime; and (3) his injury must occur under circumstances which preclude state compensation laws from providing for recovery."

In the "twilight zone" cases one of the two necessary conditions is present, *i. e.*, a personal injury or death on navigable water (including any dry dock). But the Longshoremen's Act applies only if recovery "through workmen's compensation proceedings may not validly be provided by state law". If the injury occurs on navigable water (and a dry dock is on navigable water, *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *Bethlehem Steel Co.* v. *Moore, supra*, 335 U. S. 874; *The Robert W. Parsons*, 191 U. S. 17, 33; *The Anglo-Patagonian*, 235 Fed. 92, 93-4), state laws may validly apply to it provided their doing so will not interfere with the general admiralty jurisdiction. *Davis* v. *Department of Labor and Industries, supra* (317 U. S. 249; *Baskin* v. *Industrial Acc. Comm., supra* (97 Cal. App. 2d 257; 340 U. S. 886); *Millers' Underwriters* v. *Braud, supra* (270 U. S. 59); *Moore's* case, *supra* (323 Mass. 162); *Grant Smith-Porter Co.* v. *Rohde, supra* (257 U. S. 469).

In the case at bar the deaths did not occur on navigable water nor on a dry dock, which is considered on navigable water. That they occurred on a barge is immaterial as

pointed out by this Court in *The Plymouth*, 3 Wall. (70 U. S.) 20, 35-6, and in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59-60:

> "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.
>
> "A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. * * * The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred."

The Longshoremen's Act clearly excludes "any remedies against the employer for injuries inflicted on shore", and leaves the employee "to pursue the remedies afforded by the local law." *Swanson* v. *Marra Bros., supra*, 328 U. S. at page 7. Indeed, in *Crowell* v. *Benson, supra*, 285 U. S. at pages 55-6 this Court said:

> "Unless the injuries * * * occur upon the navigable waters * * * they fall outside that jurisdiction (admiralty). * * * the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the Congressional power to create the liability prescribed by the statute (Longshoremen's Act). * * * If * * * the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, * * * to the liability which the statute creates." (Parenthetical words added.)

We submit that to follow the *Lawson* decisions of the court below (64 F. 2d 802 and 101. F. 2d 732), since which this Court has said in *Swanson* v. *Marra Bros., supra* (328 U. S. 1, 7), that the Longshoremen's Act excludes "injuries inflicted on shore", would be a clear overruling of this Court's interpretation of that Act, and merely add to the confusion in applying the Act. We believe that should be avoided to the end that the coverage section of the Act will be uniformly applied in the various circuits.

SECOND POINT.

A marine railway on land is not a dry dock.

In *Colonna's Shipyard* v. *Lowe, supra*, 22 F. 2d 843, and in *Giske* v. *Austrem and Sandstrom, supra*, 1931 A. M. C. 1200, it was held that state compensation laws would apply to accidents out of the water, on a marine railway. In the latter case, the court said:

> "The very reasoning of the learned judges in the Butler case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place."

In Norton v. *Vesta Coal Co., supra*, 63 F. 2d 165, 166, the Circuit Court of Appeals for the 3rd Circuit held the same, saying:

> "* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We can not make such assumption or speculation. * * * With these terms describing two different structures, it seems clear that, when Congress used the words 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a

field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others."

In *Rohlfs* v. *Department of Labor & Industries, supra,* 190 Wash. 566, the court held that the state compensation law applied to a workman injured on a boat on a marine railway track which had been hauled from the water for repairs, saying:

> "A marine railway, such as that upon which The Floyd was raised, runs from some distance in the water to any desired point on dry land. It is not like a floating dock or a dry dock into which a vessel which needs repair floats on the surface of the water. Upon a marine railway the boat is hauled, by some power other than its own and not connected with navigation, out of the water and to a point upon the land, where the boat remains until its future is determined by its owners. * * *
>
> "Respondent was working on land, not on the water; * * *."

However, the Circuit Court of Appeals for the 5th Circuit in *Continental Casualty Co.* v. *Lawson, supra,* 64 F. 2d 802, said:

> "The important question is whether the words 'any dry dock' are intended to include a marine railway. * * *" Page 804.
>
> "The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction for the former but not over the latter class of work." Page 805.

And in *Maryland Casualty Co.* v. *Lawson, supra,* 101 F. 2d 732, 734, the same court said:

> "We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways."

The Court of Appeals for the 9th Circuit followed this latter decision in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 410-11, emphasizing the statement of the Court of Appeals for the 5th Circuit (101 F. 2d 734) that "it must be *presumed that Congress intended* to protect the great majority of laborers employed on floating docks and marine railways *as well as* the comparatively few workmen employed *on what are to be technically considered dry docks*". (Italics supplied.)

We most heartily take issue with the assertion that such an intent of Congress "must be presumed", when Congress included dry docks and omitted marine railways, and expressly confined the coverage to accidents on navigable waters which the states could not possibly provide for by compensation statutes. This Court has said that Congress made it clear (not a presumption) that it intended "to permit state compensation protection whenever possible." *Davis* v. *Department of Labor and Industries, supra*, 317 U. S., at pages 252-3. Such a clear expression negatives any presumption to the contrary.

Nowhere can an intention of Congress be found to include marine railways in the words "any dry dock", but such a presumption of intent would have to be based on a belief that Congress did not know the difference. However, that Congress has recognized a difference between a dry dock and a marine railway is clear from the Maritime Lien Law of 1920, 46 U. S. C. § 971, which provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel • • • shall have a maritime lien on the vessel • • •."

The lien statute deals with rights under maritime contracts within the admiralty jurisdiction, but when dealing with

non-contract matters in the Longshoremen's Act, Congress did not specify any "dry dock or marine railway". It limited the Act to dry docks, which were considered as on navigable water and within the admiralty and maritime jurisdiction. *Gonsalves* v. *Morse Dry Dock Co.*, *supra*, 266 U. S. 171; *The Robert W. Parsons*, *supra*, 191 U. S. 17, 33; *The Anglo-Patagonian*, *supra*, 235 Fed. 92, 93-4, and cases there cited. Prior to the Longshoremen's Act, accidents ashore were governed by state law, and Congress in passing the Act expressly excluded such accidents from its coverage.

The decision now under review merely followed and adopted the decisions of the same court in the *Lawson* cases, *supra*, (64 F. 2d 802 and 101 F. 2d 732). The underlying reason for the decisions in those cases appears to be that both dry docks and marine railways are used for the same purpose, *i. e.*, making repairs to vessels, and therefore Congress must have intended to include marine railways in the words "any dry dock". But that clearly was not the intention of Congress because it expressly provided that the Act covered *only* accidents on navigable waters which state compensation laws could not provide for, and vessels on dry docks (whether floating or graving) were held before the Act to be on navigable waters (see cases just cited). Vessels are floated into and out of dry docks, but a vessel can not be floated onto the land above high water mark, and it was never held until the *Lawson* cases that an accident on a vessel ashore above high water occurred on the water or was within the exclusive admiralty jurisdiction.

The fact that dry docks and marine railways are used for the same general purpose is beside the point except when dealing with maritime contract rights. Piers and lighters are both used to load and discharge vessels but it has uniformly been held that an accident to a stevedore on a lighter is within the admiralty jurisdiction, whereas an accident to the same stevedore on a pier is within the state jurisdiction. The

court below recognized that the Longshoremen's Act does not apply to accidents to stevedores handling cargo on a pier, but it attempted to distinguish between stevedores ashore and repairmen ashore. This Court, however, has never found any such distinction, and has consistently held that it is only those accidents which are within the admiralty and maritime jurisdiction that the states are prevented from providing for by compensation laws.

THIRD POINT.

The Deputy Commissioner's award is a taking of property without due process of law.

The Fifth Amendment to the Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law". The Deputy Commissioner would have no authority to make an award of compensation against this petitioner except through an express grant of such authority by Congress. If, as we understand and sincerely believe, the Longshoremen's Act did not give the Deputy Commissioner authority to make an award for death resulting from injuries occurring on land above high water, or where the state could give compensation protection, his award is a usurpation of authority and the taking of property without due process. *Crowell* v. *Benson, supra,* 285 U. S. at page 56. Until set aside, however, it can be enforced to take away petitioner's property.

Conclusion.

A marine railway is not a dry dock, even though used for similar purposes, and it was not included by Congress in the Longshoremen's Act as a place "upon the navigable waters". It cannot be presumed that Congress intended to cover injuries on a marine railway, contrary to the

language of the Act. A vessel on a marine railway on land is not in fact on navigable waters, and the states can validly provide compensation protection to those injured on it. An injury sustained on land is not within the exclusive admiralty and maritime jurisdiction of the Federal Government. The states can validly provide compensation for an injury or death ashore, by the express permission of Congress in the Longshoremen's Act. The Deputy Commissioner's taking jurisdiction and ordering compensation, without congressional authority, was a taking of property without due process of law.

Respectfully submitted,

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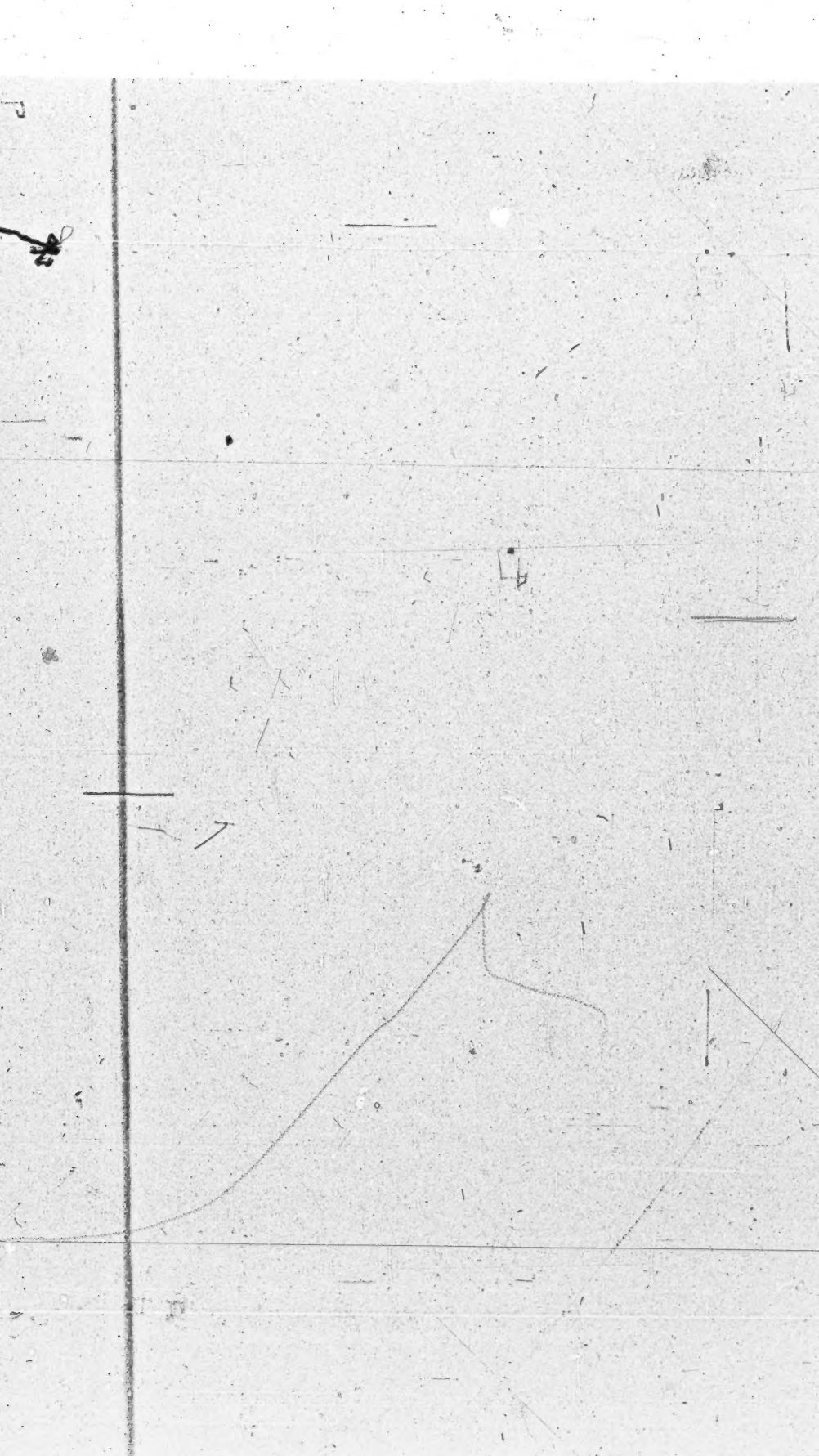

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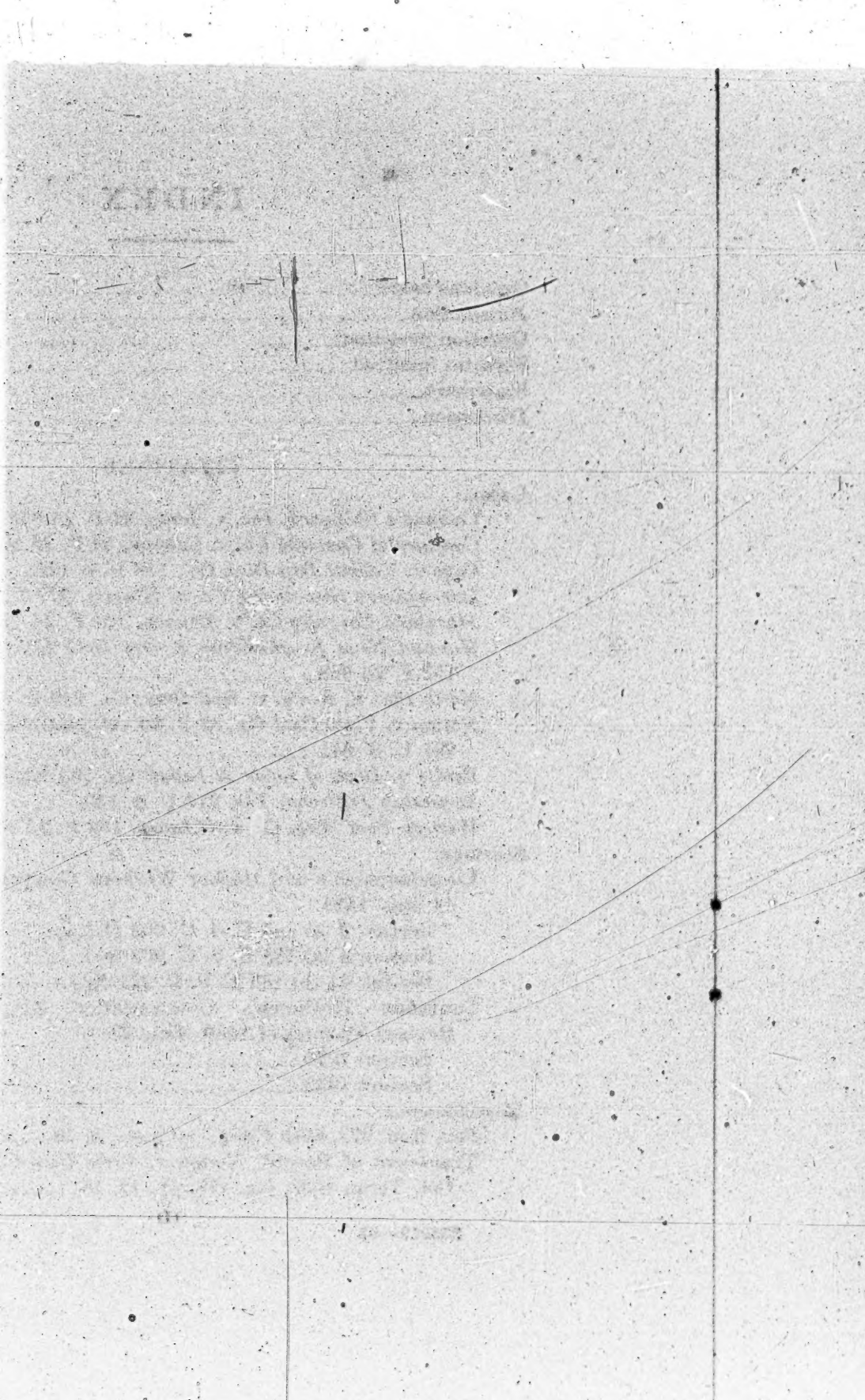

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 744

AVONDALE MARINE WAYS, INC., PETITIONER

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, MRS. VIOLA CAMPBELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT DEPUTY COMMISSIONER

OPINIONS BELOW

No opinion was written by the District Court for the Eastern District of Louisiana. The opinion of the Court of Appeals for the Fifth Circuit (R. 125–7) is reported at 201 F. 2d 437.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (R. 128). The petition for a writ of certiorari was filed April 24, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the death of employees of a marine repair yard from an explosion, while they were cleaning inside a tank of a barge hauled out of the Mississippi River on the cradle of a marine railway, occurred "upon the navigable waters of the United States (including any dry dock)," so that compensation under the Longshoremen's and Harbor Workers' Compensation Act might be paid.

STATUTES INVOLVED

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426 (33 U. S. C. 903 (a)) provides in pertinent part as follows:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

Section 2 (4) of the same Act, 44 Stat. 1425 (33 U. S. C. 902 (4)) provides:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

The Louisiana Workmen's Compensation Act, Louisiana Revised Statutes of 1950, Title 23, §§ 1031 and 1035, provides in pertinent part:

> Section 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated.
>
> * * * * *
>
> Section 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, business and occupations.
>
> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *.

STATEMENT

On August 20, 1951, Arthur Campbell and Joseph D'Arensbourg, two laborers, were killed by a flash explosion. The men had been cleaning inside a tank of a barge (R. 80) which was then at petitioner's marine repair yard on a cradle upon its marine railway whose submerged tracks extended into the Mississippi River at Avondale,

Louisiana.[1] The barge was above ground about 300–350 feet from the water (R. 58–59, 70), and some hours before the explosion had been hauled on the marine railway to have its tanks cleaned and its bottom painted (R. 32, 72). The repair work was of short duration and did not require the barge to be rolled off the railway (R. 66–67).

After a formal hearing, the Deputy Commissioner made a compensation order and award in favor of Campbell's widow and nine children, crediting the death benefits paid under the Louisiana Workmen's Compensation Act (R. 10–18). Petitioner, deceased's employer, brought suit in equity in the District Court under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921 (b)) to enjoin enforcement of the award on the ground that death did not occur "upon the navigable waters of the United States (including any dry dock)" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (R. 4–9). The District Court granted summary judgment upholding the Deputy Commissioner's awards, citing two earlier decisions of the Court of Appeals (R. 115–116). On appeal, the Court of Appeals, one judge dissenting, upheld the dismissal of the suit (R. 125–127).

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[1] The cradle of a marine railway is on wheels and rests upon tracks. When a vessel is to be raised from the water, the cradle is lowered into the water and the vessel is floated onto the cradle, where it comes to rest. The cradle is then hauled along the tracks.

DISCUSSION

The petition presents only the question whether for the purposes of compensation under the Longshoremen's and Harbor Workers' Compensation Act a marine railway, functionally indistinguishable from a dry dock, may be regarded as a dry dock. Consistency, continuity of coverage, and avoidance of a multiplicity of nice questions are promoted by the decision below. It attains uniformity of protection for the same hazards in doing the same work, regardless of minute distinctions,[2] where the injury or death occurs in what is admitted to be essentially maritime employment. *North Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119; *The Steamship Jefferson*, 215 U. S. 130, 141–2; *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 413 (C. A. 9); cf. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52.

The evidence in this record establishes that a marine railway is used for the same general purposes as a floating drydock or graven drydock (R. 74–75; 89–90). A drydock is a structure designed to take vessels out of the water for repair (cf. *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, 627), and while the mechanism for performing this service may vary, the operation

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[2] *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), dismissed as "adventitious" the fact that the stern of the vessel undergoing repair on a marine railway was partially submerged in navigable waters at high tide, but held that the Act was applicable to a marine railway.

is essentially the same.[3] To consider a marine railway as a drydock is supported by usage[4] and effectuates the purpose of the Act, "to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and *repairing* ships." (Italics supplied.) (Sen. Rep. 973, 69th Cong., 1st sess., p. 16). As the Fifth Circuit pointed out in an earlier case (*Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805):

> * * * it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large

---

[3] The types of docks are described in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5), and *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), at 167, where Judge Woolley, dissenting, observes that after the vessel is lifted and "is left standing high and dry * * * work on the vessel is in each case of the same maritime character, involving the same hazards and calling for the same compensation."

[4] See *North Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 123. For use of the term "drydock" to include a marine railway, cf. *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733–34 (C. A. 5). The employer in the *Maryland Casualty Co.* case, although operating a marine railway, called itself United Dry Dock, 101 F. 2d at 734.

shipyard for employers to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time.

The Fifth Circuit in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, has previously held that a marine railway is a drydock within the meaning of the Act; that in nautical parlance, "drydock", "floating dock", and "marine railway" are interchangeable terms (101 F. 2d 732 at 733); and that "it must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks" (101 F. 2d at 734). The same result was reached by the Ninth Circuit in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, where identical contentions were raised and compensation under the state law had also been paid. See also *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4).

Norton v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, the earliest opinion on the classification of a marine railway by a Court of Appeals,* does hold the other way, and in this Court Government

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*It was preceded by *Colonna's Shipyard, Inc.* v. *Lowe*, 22 F. 2d 843 (E. D. Va.) and followed by *Rohlfs* v. *Dept. of Labor & Industries*, 190 Wash. 566.

counsel did adopt the Third Circuit's view, after first obtaining a grant of certiorari to review the decision. 291 U. S. 641. But the judgment may not be technically in conflict, for after the vessel had been raised from the river, the cradles of the railway were removed and the vessel was blocked up,[4] whereas here the barge rested on the cradle of the marine railway (R. 66–67). In any event, it should be pointed out that the view expressed by Government counsel in the *Vesta Coal Co.* case was not that of the Employees' Compensation Commission (now the Bureau of Employees' Compensation) either before that decision[5] or since, and it has not been followed by the administrative agency or the Department of Justice.[6] We believe the reasoning of the majority of the Third Circuit in that case to be unsound, and that the dissent interpreting the phrase "*any* dry-

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[4] The opinion of the Court of Appeals so states. See also Transcript of Record, *Norton* v. *Vesta Coal Company*, Sup. Ct., October Term, 1933, No. 178, pp. 12, 16.

[5] The Government's brief noted (p. 5) that the Commission, "which by Section 39 of the Act is charged with its administration and authorized 'to make such rules and regulations * * * as may be necessary in the administration of this Act,' has provided by a regulation which has been in effect since the passage of the Act in 1927 that a marine railway is a dry dock."

[6] *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5) and *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), as well as the instant case, attest that the administrative agency and the Department of Justice have not acquiesced in the opinion of the Third Circuit in the twenty years since its rendition.

dock[2]' [italics supplied] as one of enlargement has correctly held the field.

Respectfully submitted.

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MAY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC., PETITIONER

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, MRS. VIOLA CAMPBELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER

OPINIONS BELOW

No opinion was written by the United States District Court for the Eastern District of Louisiana. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 87–89) is reported at 201 F. 2d 437.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (R. 90). The petition for a writ of certiorari was filed April 24, 1953, and granted on June 8, 1953 (R. 92). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether compensation awards could be made by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act to the widow and minor children of one of petitioner's employees, who had been killed by an explosion while engaged in cleaning a tank of a barge located on the ways of a marine railway by means of which the barge had been hauled out of the Mississippi River for repairs.

STATUTES INVOLVED

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 1426, 33 U. S. C. 901, *et seq.*) provides in pertinent part:

> SECTION 2. *Definitions.*
>
> * * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).
>
> * * * * *
>
> SECTION 3. *Coverage.*
>
> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if

recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

2. The Louisiana Workmen's Compensation Act (Louisiana Revised Statutes of 1950, Title 23) provides in pertinent part:

> SECTION 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated. * * *
>
> SECTION 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:
>
> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *.

STATEMENT

Avondale Marine Ways, Inc., petitioner herein, is a Louisiana corporation owning and operating a marine repair yard on the Mississippi River at Avondale, Louisiana (R. 23). It is an authorized self-insurer under the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act (R. 23).

Petitioner does not have at its Avondale ship repair yard a floating or graven dry dock in order to obtain the necessary access to the hull of a vessel for inspection, repairs, or painting (R. 55). Instead, petitioner uses for this purpose a marine railway which extends from the land on shore down into the waters of the Mississippi River (R. 22, 55–57). The cradle of the marine railway is on wheels, which in turn rest upon the tracks of the railway (R. 22). When a vessel is to be pulled from the water for repairs, the cradle of the marine railway is lowered into the water, the vessel is floated onto the cradle and, while the vessel is thus resting on the cradle, the cradle together with the vessel is hauled out of the water (R. 22). Occasionally, when there are other vessels to be repaired, the vessels hauled out of the water by the marine railway are rolled over and rested on cribbing on land to make the cradle available for the hauling of other vessels from the water (R. 48–49).

On July 20, 1951, the *Walter Russ,* a drilling barge, not owned by petitioner, was hauled a distance of about 300–350 feet out of the water by petitioner's marine railway. No part of the barge overhung the water and petitioner's workmen could walk all around the barge on land in order to perform the repair work of cleaning the barge's tanks and painting its hull (R. 52, 53). The barge

was not removed from the cradle since it was expected that the work would be of relatively short duration (R. 49). While these repairs were being made, a flash explosion occurred in one of the barge's tanks, instantly killing Arthur Campbell, an employee of petitioner who, in the course of his employment, was then cleaning out the inside of the tank (R. 21–22).[1]

The deceased's widow and nine minor children filed claims for compensation under the Longshoremen's Act with the Deputy Commissioner for the Seventh Compensation District (R. 20). After formal hearing (R. 17–84C), the Deputy Commissioner made awards of funeral expenses and weekly benefits under the Longshoremen's Act in favor of the claimants, allowing as credits the $400 funeral expenses and other monies paid voluntarily by petitioners directly to the claimants in the amounts fixed by the Louisiana Workmen's Compensation Act (R. 7–12).[2]

Petitioner filed a complaint for injunction in the United States District Court for the Eastern

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[1] Another employee of petitioner, Joseph D'Arenbourg, was also killed by this explosion. His widow and minor children have likewise sought compensation under the Longshoremen's Act, and the proceeding involving these claims has paralleled those of the instant case. The parties have stipulated that the decision in the instant case governs the D'Arenbourg claims (R. 90–91).

[2] Unlike the Longshoremen's Act, the Louisiana Workmen's Compensation Act does not require the employer to pay funeral expenses. See Louisiana Revised Statutes of 1950, Title 23, Section 1231, *et seq.*

District of Louisiana, seeking to set aside and annul the Deputy Commissioner's awards on the ground that the decedent's death "did not occur upon the navigable waters of the United States (including any dry dock), but occurred in the course of employment on land and is within the * * * Louisiana Workmen's Compensation Act" (R. 2–6, 5). The Deputy Commissioner moved for summary judgment (R. 13–16). The District Court granted the motion and entered a judgment in favor of respondents, citing *Continental Casualty Company* v. *Lawson*, 64 F. 2d 802, and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, in which the Court of Appeals for the Fifth Circuit previously had ruled that a workman's claim for injuries suffered while repairing a vessel located on a marine railway was covered by the Longshoremen's Act (R. 85–86). On appeal, the court below affirmed, stating that it was "of the clear opinion that [its prior decisions] were when decided well decided; that no case since decided furnishes any sound basis for a different view; and that many cases which have been decided since have given the questioned decisions full support and approval" (R. 88). Judge Rives dissented (R. 88–89).

SUMMARY OF ARGUMENT

Since the Longshoremen's Act concededly extends to injuries suffered by workmen while repairing ships in floating or graven dry docks, the

question in this case reduces itself to whether marine railways which, like graven dry docks, are physically attached to land and are commonly used for the same purpose of removing ships from water to repair their otherwise inaccessible hulls are to be differentiated. The holding below that the Act embraces such injuries is supported by two decisions previously rendered by the court below and a recent decision by the Ninth Circuit, although contrary to the rulings in three cases, including an early decision by the Third Circuit. While the Department of Justice, in contrast to the administering agency which has consistently read the Act as covering such injuries, took the contrary position for a short while some twenty years ago, the Department's position has been for some time that the agency's construction is correct.

A. Petitioner's claim that marine railways are not within "any dry dock" as used in Section 3 (a) of the Act (*supra*, p. 2) apparently adopts the approach and reasoning of *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, the first decision by a Court of Appeals on the issue, but which has not been followed by any federal court. This interpretation clearly misconceives the industry understanding of "dry dock"; the term is commonly understood to include marine railways, a fact which this Court has already recognized. *Northern Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S.

119. The *Vesta Coal* decision also ignored the Act's legislative history, which explicitly reveals a congressional purpose to provide protection to ship repairmen. Marine railways constitute the majority of the ship repair structures in the United States, and this purpose can be given full effect only by holding marine railways to be "dry docks", a result further justified by the lack of any differentiation in the legislative history between marine railways and other kinds of dry docks.

Moreover, the position of the Third Circuit and of petitioner is based on a restrictive reading of the Act, in sharp contrast to the accepted rule that the Act is to be liberally construed to effectuate its purposes. Marine railways are clearly within "any dry dock" when that term is liberally construed to mean a dry place to work, particularly since they not only perform the same functions but have the same relation to maritime rights and obligations as do the other types of dry docks. The Third Circuit's ruling likewise gives no effect to the word "any" modifying "dry dock", by failing to recognize that "any" would have been unnecessary if Congress, knowing of the several types of ship repair structures, had intended to exclude marine railways from the Act.

B. 1. Similarly, there is no merit to petitioner's contention that the state law exception contained in Section 3 (a) (*supra*, p. 2) precludes compen-

sation awards in the instant case. The fact that the decedent was killed while physically on land does not remove the compensation claim from admiralty jurisdiction even though the normal rule may be that only injuries suffered in navigable waters or on the high seas are cognizable in admiralty. For the limits of admiralty jurisdiction are not inflexible and there is no barrier to Congress' enlarging that jurisdiction to include compensation for injuries of this type here involved.

Morover, the delimitation of admiralty jurisdiction has not been based solely on the physical location where the injury occurred; on the contrary, substantial, if not conclusive, weight has been accorded to the relation of the structure involved to land or navigable waters. Thus, although to a layman they would seem to be in navigable waters, structures such as docks, wharves, and bridge abutments have been held to be an extension of land and hence constructively "land" because of their close tie-in with land commerce. And although they are permanently affixed to land, graven dry docks are regarded as constructive "navigable waters" and hence within the admiralty jurisdiction because of their concern with ships and maritime commerce. Since marine railways are concerned with maritime—and not land—activities and are indistinguishable from graven dry docks, both being attached to land and serving the same maritime functions, a marine railway is no more "land" than is a

graven dry dock. Under the doctrine of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, which this Court uses in construing the coverage provisions of the Longshoremen's Act, injuries on a marine railway would be within the exclusive jurisdiction of admiralty and could not be validly covered by state compensation laws. Cf. *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119.

2. Nor does petitioner's position derive any support from the rationale of *Davis* v. *Department of Labor*, 317 U. S. 249, reversing the rejection under state law of a compensation claim in a case of "marginal employment" which the Court recognized might easily have been held to be on the federal side of the boundary. Far from enlarging the state law exception in Section 3 (a), the *Davis* case fosters the trend toward a restrictive interpretation of that provision. The purpose of the "twilight zone" doctrine formulated in *Davis* requires that the principle there applied to state compensation awards should apply at least equally to awards under the Longshoremen's Act, an intent plainly manifested on the face of the *Davis* opinion (see 317 U. S. at 256–7), even though until now this Court has had occasion to apply it only where state law has been invoked.

Applying the *Davis* doctrine here, there is no occasion to reject the Deputy Commissioner's awards for "apparent error," since not only are there several dominant elements of maritime con-

cern but the awards are in accord with this Court's decisions in closely analogous situations as well as with rulings by Courts of Appeals on this very question.

ARGUMENT

THE DEPUTY COMMISSIONER COULD PROPERLY MAKE AN AWARD UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT FOR INJURIES OCCURRING ON A MARINE RAILWAY

INTRODUCTORY

In this case, the Deputy Commissioner has awarded compensation under the Longshoremen's Act to the widow and nine minor children of a deceased employee of petitioner, who was killed while repairing a vessel located on the ways of petitioner's marine railway.

Marine railways, such as that here involved, constitute one of the three general types of structures commonly used in the United States for taking ships out of water in order to repair their otherwise inaccessible hulls. Another such structure is the floating dry dock in which a vessel is moved through open gates and then, after closing the gates, the water is pumped out, so that the resulting buoyancy causes the vessel to rest on the dry bottom of the dock while the dock itself is floating in the water. The third type of structure is the graven dry dock which is dug into the land and, though adjacent to navigable waters, cannot ever be floated upon it. It has gates at the water edge for the admission of water and of

a vessel; when a vessel is floated into it on water, the gates are closed and the water pumped out, so that the vessel rests upon the bottom of the dock which in turn is physically on land.

It is clear beyond any question that an injury to a workman repairing a vessel located in a floating dry dock is within the Longshoremen's Act since the injury occurs both on "navigable waters" and in a "dry dock" within the specific provisions of Section 3 (a). In addition, petitioner concedes, as it must, that a workman injured while repairing a vessel in a graven dry dock is entitled to receive compensation under the Longshoremen's Act (Pet. Br., pp. 23, 28). See *The Anglo-Patagonian*, 235 Fed. 92 (C. A. 4), certiorari denied *sub nom. Lord* v. *Ledwitch*, 242 U. S. 636; *Butler* v. *Robins Dry Dock and Repair Co.*, 240 N. Y. 23; *O'Hara's Case*, 248 Mass. 31; cf. *The Robert W. Parsons*, 191 U. S. 17, 33–34; *The Steamship Jefferson*, 215 U. S. 130, 142–143. Therefore, the basic question presented is whether a marine railway is so different from floating and, in particular, from graven dry docks that an injury suffered by a workman repairing a vessel on a marine railway is not within the Act's coverage.

Petitioner's position that such injuries are not under the Longshoremen's Act is supported by holdings to that effect in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, as well as in *Colonna's*

Shipyard v. *Lowe*, 22 F. 2d 843 (E. D. Va.) and *Rohlfs* v. *Department of Labor and Industries*, 190 Wash. 566.[3] The holding of the court below that such injuries are covered by the Longshoremen's Act is supported by its own prior decisions in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802 (C. A. 5), and in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5), as well as by the recent decision of the Court of Appeals for the Ninth Circuit in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9). Each of these cases concerned injuries to employees repairing vessels on marine railways, and in the latter cases the Courts of Appeals upheld the Deputy Commissioner's award.[4]

While the Department of Justice—in contradistinction to the Employees Compensation Commission (now the Bureau of Employees Compensation), which is the agency charged with the administration of the Longshoremen's Act—once expressed the view that such injuries were not within the Longshoremen's Act, this was 20 years ago when *Norton* v. *Vesta Coal Co., supra*, was

[3] Petitioner also refers to *Giske* v. *Austrem and Sandstrom*, 1931 AMC 1200 (Pet. Br. pp. 9, 25). But that was a decision by a Superior Court, not, as petitioner states, by the Supreme Court of Washington (Pet. p. 23; Pet. Br. p. 9; but see Pet. p. 12).

[4] Of the 20 federal judges who have considered this question, 14 were of the opinion that the Longshoremen's Act extended to injuries suffered on a marine railway.

pending before this Court on a writ of certiorari.[5] Since that time, the Department has reconsidered the question, and now believes that its earlier position was unsound and that, as the Bureau of Employees Compensation has always viewed the issue,[6] the *Continental Casualty*, *Maryland Casualty*, and *Western Boat Bldg.* cases, rather than the contrary decisions, properly construe the Longshoremen's Act to encompass injuries suffered by a workman repairing a vessel dry-docked on a marine railway.

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[5] After the writ was granted, the Department took the position that the fact that the injury occurred on what was physically land precluded coverage under the Longshoremen's Act (Brief for Petitioner in No. 178, Oct. Term, 1933). But see *infra*, pp. 27–41. Since the Department adopted the Third Circuit's conclusion, if not its reasoning, this Court dismissed the writ of certiorari with the comment that "no substantial controversy is presented at the bar of this Court." 291 U. S. 641.

[6] The Employees Compensation Commission, from the outset, has consistently construed the Act as applying to employees injured while engaged in repairing ships on a marine railway. As noted in the Government's brief in this Court in *Vesta Coal*, the Commission "which by Section 39 of the Act is charged with its administration and authorized 'to make such rules and regulations * * * as may be necessary in the administration of this Act,' has provided by a regulation which has been in effect since the passage of the Act in 1927 that a marine railway is a dry dock. 1927 AMC 1550, 1552." (Brief for Petitioner in No. 178, Oct. Term, 1933, p. 5.) See also the *Colonna's Shipyards*, *Vesta Coal*, *Continental Casualty*, *Maryland Casualty*, and *Western Boat Bldg.*, cases, cited in the text, *supra*, pp. 12–13, in all of which the Deputy Commissioner took the same view. In the federal cases arising since the *Vesta Coal* case in 1934, the Department of Justice has supported the Deputy Commissioner.

In our view, marine railways are included in the phrase "any dry dock" contained in Section 3 (a) of the Longshoremen's Act. *Infra*, pp. 15–26. The fact that the marine railway was technically attached to land does not, in view of the strong countervailing maritime elements connected with marine railways, exclude suits for injuries occurring thereon from admiralty jurisdiction and therefore from coverage under the Longshoremen's Act. *Infra*, pp. 27–41. And even if the nonmaritime aspects might be deemed dominant, the opposing maritime elements and the conflict among the lower courts as to the applicability of the Longshoremen's Act bring the case within the "twilight zone" doctrine of *Davis* v. *Department of Labor*, 317 U. S. 249, a decision rendered subsequent to the Government's acceptance, in 1933–34, of the Third Circuit's ruling of noncoverage in the *Vesta Coal Co.* case. *Infra*, pp. 41–58.

A. *Marine railways are included within the phrase "any dry dock" as used in Section 3 (a) of the Longshoremen's Act*

Apparently adopting the approach and reasoning of the Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165, the first appellate decision on the question,[1] petitioner

[1] The District Court's decision in *Colonna's Shipyard* case, 22 F. 2d 843 (E. D. Va.), was rendered prior to *Vesta Coal*. The *Rohlfs* case, 190 Wash. 566, was decided later. Both,

claims that marine railways are not within the phrase "any dry dock" as it appears in Section 3 (a) of the Longshoremen's Act (*supra*, pp. 2–3) (Pet. Br. pp. 10, 25–26). In reaching its conclusion, the Third Circuit reasoned that since the terms "dry dock" and "marine railway" technically describe different structures, and a contract to rent or build one could not be fulfilled by renting or building the other, the common meaning of "dry dock" excludes marine railways (63 F. 2d at 166). It consequently ruled (*id.*):

> * * * With these terms describing two different structures, it seems clear that, when Congress used the word "dry dock," it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others. * * *

1. Petitioner's and the Third Circuit's conclusion is based on a misconception as to the meaning of "dry dock." Because of the identity of the function performed by floating dry docks, graven dry docks, and marine railways, the generic term

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however, are based on grounds different from that relied on in *Vesta Coal*. As far as we have been able to ascertain, no federal District Court or Court of Appeals has followed *Vesta Coal*.

"dry dock" is used in maritime affairs to refer to all three structures. As pointed out in both *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733, and *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411, "In nautical parlance 'dry dock', 'floating dock' and 'marine railway' are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i. e., to raise a ship out of water to permit examination and repairs to her hull which are impossible while she is afloat. A ship's master speaks of 'dry docking' regardless of which method is used." Indeed, the company involved in the *Maryland Casualty* case called itself a dry dock company, although it operated a marine railway (101 F. 2d at 733).

Likewise, in *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, the parties, a shipbuilding company and a steamship company, as well as this Court, described the marine railway there involved as a dry dock. The Court summarized the ship repair contract in issue as providing that the shipbuilding company "should tow the vessel from where she lay to the shipyard, haul her out as required upon the *marine railway* to a position on dry land adjacent to the machine shop—*the place being known as the 'dry dock', and the hauling out being described as 'docking'*— * * *" (italics supplied) (249 U. S. at 123). Adopting the terminology of the parties, the Court went on to detail the facts, still refer-

ring to the marine railway as a dry dock (249 U. S., at 123–124):

> * * * At the time the contract was made, another vessel (the *Archer*) was upon the *dry dock*, and it was uncertain how soon she could be returned to the water. It was understood that the *Yucatan* should be hauled out as soon as the *Archer* came off, should remain upon the *dry dock* only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. * * *
>
> * * * * *
>
> The vessel was *docked* and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the *dry dock*. On June 17 she was hauled out and remained in *dry dock* for about two weeks while her bottom plates were renewed. * * * [Emphasis added.]

And, in holding that a claim for repairs made to the vessel while on a marine railway was within the admiralty jurisdiction,* the Court emphasized

* In so holding the Court resolved the question reserved in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, where the Court, in ruling that a contract to repair a vessel in a graven dry dock was maritime in nature, expressed doubts whether the same was true of a contract to repair a vessel on a marine railway. See *infra*, pp. 36–37.

the functional identity of marine railways and floating dry docks (249 U. S. at 128):

> * * * there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

See, also, *infra*, pp. 39–40.

Plainly, therefore, the common acceptation of "dry dock," at least among those engaged in the trade, is that it includes marine railways. Since undefined language in a statute is normally to be read in the sense common to the field covered by the statute rather than in accordance with unusual or artificial definitions (*O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370–371; *United States* v. *Maher*, 307 U. S. 148, 155; *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 525), it follows that marine railways are embraced within "dry dock" as used in Section 3 (a) of the Longshoremen's Act. On its face, the term clearly has that meaning.

2. Not only is the construction adopted by the Third Circuit and petitioner based on a misconception as to industry usage of "any dry dock," but it fails to give effect to the intent of Congress, as evidenced in the Act's legislative history. The report of the Senate Judiciary Committee, recommending the passage of S. 3170,

69th Cong., the bill which was finally enacted as the Longshoremen's Act, contains this significant comment (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16):

> The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships * * *.*

Although the House Judiciary Committee amended S. 3170 to make it conform substantially to H. R. 12063, 69th Cong., previously reported (H. Rep. No. 1767, 69th Cong., 2nd Sess., p. 20), the Committee did not change the language here pertinent. In its report on H. R. 12063 the Committee stated (H. Rep. 1190, 69th Cong., 1st Sess., p. 1):

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* While the Committee's report goes on to recognize that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States, this was so "doubtless because in the opinion of Congress, * * * this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the States * * *." *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C. A. 5); see *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 272–273; *Smith & Son* v. *Taylor*, 276 U. S. 179. In contrast, there had been no such rulings in regard to injuries suffered by employees engaged in repairing vessels on a marine railway. On the contrary, this Court had expressly held that the repairing of a vessel on a marine railway is within the admiralty jurisdiction. *Northern Pac. S. S. Co. v. Hall Bros. Co.*, 249 U. S. 119, *supra*, pp. 17–19.

> The principal wage earners provided for are longshoremen—men engaged in loading and discharging the cargo of a vessel in the dock. Next in importance are the ship repairmen—carpenters, painters, boiler makers, etc."[10]

Thus, although the legislative history contains no express statement that marine railways are included within "any dry dock," it manifests a clear purpose that men engaged in repairing ships should be covered, a purpose evidenced in the Act by the specific inclusion of "any dry dock," i. e., places where ships are repaired. Since marine railways not only are in general use for ship repairing, particularly in the interior and Gulf states, but constitute a majority of the dry docks in the United States,[11] this congressional purpose can be given full effect only by reading "any dry dock," as Congress obviously visualized the phrase, to embrace the marine railway type of

[10] Significantly, at no time during the hearings on the bill was there any distinction made between marine railways and the other types of dry docks, although it was repeatedly recognized at the hearings that men engaged in repairing vessels were to be within the coverage of the proposed legislation. See Hearings before House Judiciary Committee on H. R. 9498, 69th Cong., 1st Sess., pp. 34, 44–45, 52, 118–119, 141–142, 146, 177; Hearings before a Subcommittee of the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess., pp. 19, 21, 24, 38, 95.

[11] According to the "Record of American and Foreign Shipping" of the American Bureau of Shipping, on January 1, 1932, 268 of the 530 dry docks in the United States were marine railways.

structure for ship repairing. As stated in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d at 734 (C. A. 5):

> There are few dry docks, technically considered, in the United States. Floating docks or marine railways or both are to be found at every seaport. It must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks. We entertain no doubt that in extending the law to cover "any dry dock" Congress intended to include marine railways.

See, also, *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411 (C. A. 9); *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C. A. 5).[17]

3. Moreover, the technical restrictive approach to the Longshoremen's Act, on which the position of the Third Circuit and petitioner is based, violates the well settled rule as to the construction

[17] The fact that in the Ship Mortgage Act of 1920, 41 Stat. 1005, 46 U. S. C. 971, Congress made express provision for maritime liens for use of a "dry dock or marine railway" does not, contrary to petitioner's suggestion (Pet. Br., pp. 27–28), indicate a congressional intent to exclude marine railways from "any dry dock" as used in the Longshoremen's Act. The two statutes obviously have different purposes and background, and it is clear that the language of each statute is to be construed in light of, and to effectuate, the purpose of that statute. Cf. *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198; *United States* v. *Champlin Refining Co.*, 341 U. S. 290; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433.

to be given that Act. Since the Act is remedial, designed to enable injured employees or their families to receive the requisite financial aid needed in time of stress, it has become established that the Act should be liberally construed to effectuate its purpose. *Baltimore & P. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414; *Harbor Marine Contracting Co.* v. *Lowe*, 152 F. 2d 845 (C. A. 2), certiorari denied, 328 U. S. 837; *Southern S. S. Co.* v. *Norton*, 101 F. 2d 825 (C. A. 3); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968, 971 (C. A. 4); *De Bardeleben Coal Corp* v. *Henderson*, 142 F. 2d 481 (C. A. 5). It is because it regarded the Third Circuit's approach as improperly restrictive that the Court of Appeals for the Fifth Circuit, in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, expressly disagreed with the ruling in *Vesta Coal* (64 F. 2d at 804):

> * * * In the case the Warren Elsey (the *Vesta Coal* case) the majority opinion, insisting upon a strict construction of the term "dry dock", holds that it would be mere speculation to impute to Congress an intention "to include something it did not say it included." * * * [W]e feel obliged to agree to the dissenting opinion * * * of Judge Woolley, and to adopt a more liberal interpretation of the phrase, as he correctly quotes it, "any dry dock."[13]

[13] The majority in the *Vesta Coal* case was composed of Judges Buffington and Davis. Judge Woolley dissented.

When the phrase "*any* dry dock" (italics supplied) is liberally construed, there is no reason to distinguish marine railways from floating and graven dry docks. Petitioner's witnesses in this case admitted that a marine railway is used for the same purpose and reasons as floating or graven dry docks, i. e., removing the water from around a vessel to make its hull accessible for repairs (R. 56, 67–68). Moreover, it is clear that, although the structures and methods used for removing the water are technically different, the three structures all have the same relation to maritime rights and obligations. *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 128–129. "In these three types of docks there is no difference in purpose or use, or in their relation to maritime rights and obligations. All are concerned with maritime repairs. Each is an instrumentality in the same art. Their only difference is in the methods in which they function." (*Norton* v. *Vesta Coal, supra*, at 167 (dissent).) In these circumstances, "whatever may have been the definition * * * must be enlarged to include modern facilities for repairing boats out of the water, as the meaning of the term, used in its common, ordinary sense, means a dry place to work in." *Continental Casualty Co.* v. *Lawson*, 2 F. Supp. 459, 460 (S. D. Fla.), reversed on another ground, *Continental Casualty Co.* v. *Lawson*, 64 F.

2d 802 (C. A. 5); cf. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52."

4. Finally, petitioner's position fails to give effect to the word "any" modifying "dry dock" in Section 3 (a). As the dissent in *Vesta Coal* points out (63 F. 2d at 167), the statutory language, which is here to be construed, does not consist solely of the words "dry dock" but rather of the phrase "*any* dry dock." Congress undoubtedly knew that there was more than one kind of dry dock and further that floating dry docks are on navigable waters whereas graven dry docks, as well as marine railways, are physically attached to land. The phrase "any dry dock" was unnecessary as far as floating dry docks were concerned since injuries occurring therein would automatically fall within the statutory language, "an injury occurring upon the navigable waters of the United States", which is the general standard used in the Act (*supra*, p. 2). And if Congress had used the phrase "any dry dock" to cover only graven dry docks, the "any" modifying "dry dock" would have been unusual, since in that situation the language would more appropriately have been "including a graven dry dock" or "including *a* dry dock." The fact that Congress used the more inclusive "any" to modify "dry dock" strongly

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"Since the *Vesta Coal* decision, the Third Circuit has recognized that the Longshoremen's Act is to be liberally construed. *Southern S. S. Co.* v. *Norton*, 101 F. 2d 825.

suggests the congressional understanding that the Act embraces death or injury incurred at any type of dry dock, which, as we have shown (*supra*, pp. 16–19, 22, 24), includes marine railways. In adding "(including any dry dock)", Congress extended the coverage of the Act to one type of death or injury not physically occurring on navigable waters.[15] We show below (*infra*, pp. 27–30) that congress could validly include this area within admiralty jurisdiction, and we have already pointed out (*supra*, pp. 19–22) that it intended to do so when it used the phrase "any dry dock".[16]

B. *The state law exception contained in Section 3 (a) of the Longshoremen's Act does not preclude compensation awards in the instant case*

Petitioner also contends that the Longshoremen's Act does not apply in the instant case for the further reason that the Louisiana Workman's Compensation Act (*supra*, p. 3) could validly

[15] "Including" often means "or" or "as well as", and connotes an addition to, or enlargement of, the preceding description. *Red Hook Cold Storage Co., Inc.* v. *Department of Labor*, 295 N. Y. 1, 8, 64 N. E. 265, 267; *Carr* v. *Railton*, 66 R. I. 225, 243, 18 A. 2d 646, 654; *Arnold* v. *Arnold*, 193 Or. 490, 502, 237 P. 2d 963, 969; *Lowry* v. *City of Mankato*, 231 Minn. 108, 115–6, 42 N. W. 2d 553, 559; *Illinois Cent. R. Co.* v. *Franklin County*, 387 Ill. 301, 314, 56 N. E. 2d 775, 781; cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 189.

[16] The administering agency has construed the Act to cover marine railways since its passage in 1927. See fn. 6, *supra*, p. 14.

provide compensation for the decedent's death and therefore that the case falls squarely within the exclusion from coverage under the Act contained in Section 3 (a) for situations where "recovery for the disability or death through workmen's compensation proceedings may * * * validly be provided by State law * * *." This contention has two facets: First, petitioner urges that since the decedent was on land when the fatal accident occurred, state rather than admiralty jurisdiction attached because only injuries occurring on navigable waters and the high seas are subject to admiralty jurisdiction (Pet. pp. 19–20, Pet. Br. pp. 10, 12, 23–24).[11] Second, petitioner claims that, even if the injury was maritime in nature, it still was a matter of state concern under the line of cases stemming from *Davis* v. *Department of Labor*, 317 U. S. 249, which, as construed by petitioner, have substantially expanded the state law exception contained in Section 3 (a) (Pet. Br. pp. 22–23). These contentions are both without merit.

1. *The fact that the decedent was on land when he was killed does not preclude coverage under the Longshoremen's Act.* - (a) It is true that there is a substantial number of opinions of this Court enunciating the general principle that only in-

[11] This was the basis of the Government's acceptance of the decision in *Vesta Coal* (see Brief for Petitioner in No. 178, Oct. Term, 1933) and of the dissent below (R. 88–89), as well as of the rulings in *Colonna's Shipyards* and *Rohlfs*, *supra*, fn. 7, pp. 15–16.

juries suffered on navigable waters or the high seas are regarded as subject to admiralty jurisdiction. But this delineation of admiralty jurisdiction has never been regarded as inflexible. This Court has long since recognized that "[t]he precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history" (*The Blackheath*, 195 U. S. 361, 365; see also *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52), and further that "the Constitution does not prohibit what convenience and reason demand." *The Blackheath, supra* at 367.

In accordance with this flexibility of admiralty jurisdiction, the Court, in upholding the constitutionality of the Ship Mortgage Act of 1920 (41 Stat. 1000–1006, 46 U. S. C. 911 *et seq.*), which for the first time extended the jurisdiction of admiralty to a suit to foreclose a mortgage on a ship, stated (*Detroit Trust Co. v. The Barlum*, 293 U. S. 21 at 52):

> The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesee*

Chief, 12 How. 443, overruling *The Thomas Jefferson*, 10 Wheat. 428.

On a similar basis, the Court of Appeals for the Ninth Circuit in *United States* v. *Matson Navigation Co.*, 201 F. 2d 610, has recently sustained as constitutional the so-called Admiralty Extension Act of June 19, 1948 (62 Stat. 496, 46 U. S. C. 740), extending admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land," even though damages done or consummated on land have in the past been regarded as beyond admiralty jurisdiction (see cases cited *infra*, pp. 31–33).

Most significantly, this Court's opinion in *Washington* v. *Dawson & Co.*, 264 U. S. 219, holding unconstitutional the second effort by Congress (Act of June 10, 1922, 42 Stat. 634) to permit the application of state compensation laws to injuries suffered within the admiralty jurisdiction, in effect suggested to Congress (264 U. S. at 227–228):

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admi-

> ralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.

The Longshoremen's Act was enacted pursuant to this suggestion by the Court. See H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2; S. Rep. No. 973, 69th Cong., 1st Sess., p. 16.

In these circumstances, the general definition of admiralty jurisdiction presents no obstacle to reading the Longshoremen's Act as applying to the injuries here involved, even though such a construction be deemed an infringement upon that pre-existing general definition, particularly since, as we show (*supra*, pp. 16–22, 24; *infra*, pp. 35–41), "reason and convenience" demand such a result. Cf. *Continental Casualty Co.* v. *Lawson*, 64 F. 2d at pp. 804–805; see *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36. And since marine railways have now been included within the jurisdiction of admiralty, which is exclusive as to matters covered by it, recovery for injuries to a workman engaged in maritime employment thereon, such as the decedent here, "may not validly be provided by State law." See, e. g., *Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Washington* v. *Dawson & Company*, 264 U. S. 219; *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449.

(b) Apart from whether the Longshoremen's Act enlarges admiralty jurisdiction, an examina-

tion of this Court's decisions reveals, we believe, that the Court in resolving the jurisdictional question has not been governed solely by where the injury has occurred but has frequently considered the relation of the structure involved to land or to navigable waters as an important, if not the governing, criterion.

Thus, there can be no question that in fact a dock or wharf is physically located in or over water, and so, to a layman at least, it would seem that the application of the physical test of jurisdiction would require that damage to the dock and, similarly, an injury to a workman on the dock, be held to be maritime in nature. Yet, at least until the Admiralty Extension Act (*supra*, p. 29), this Court had held such torts to be of a nonmaritime nature, on the ground that docks are "structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such." *Cleveland Terminal and Valley Railroad* v. *Cleveland Steamship Company*, 208 U. S. 316, 321; *The Plymouth*, 3 Wall. 20; *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 275–276; cf. *Ex parte Phoenix Ins. Co.*, 118 U. S. 610; *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388. In taking into account the purpose of the damaged structure, the result reached in these cases

where the compensation claim was filed under state law, but rather because of the fortuitous circumstance that the only cases coming before the Court in which *Davis* could be applied happened to involve such situations.[22] That the Court intended the doctrine to apply at least equally to awards under the Longshoremen's Act is manifest on the face of the opinion (317 U. S. at 256–257):

> Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U. S. C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. * * *.

[22] *Swanson* v. *Marra Bros.*, 328 U. S. 1 (Pet. Br., pp. 18–20) has no relevance here, since as petitioner admits (Pet. Br. p. 18), it deals with a different question. Moreover, the quoted excerpts from this Court's opinion were general in nature and patently not directed at the borderline situation here involved.

The lower federal courts have uniformly construed *Davis* as applying at least equally to awards under the Longshoremen's Act.[24] *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951–2 (C. A. 4); *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9); *Gahagan Const. Corp.* v. *Armao*, 165 F. 2d 301, 304 (C. A. 1); cf. *Travelers Ins. Co.* v. *Branham*, 136 F. 2d 873 (C. A. 4).[25] As formulated in *Gahagan Const. Corp.* v. *Armao*, *supra* at 304:

> The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld.

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[24] *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332 (C. A. 2), relied on by petitioner (Pet. Br., p. 23), was decided several years before *Davis*. *Royal Indemnity Co.* v. *Puerto Rico Cement Co.*, 142 F. 2d 237 (C. A. 1), certiorari denied, 323 U. S. 756 (Pet. Br., pp. 22–23), involved a totally different problem. The issue was whether the Longshoremen's Act, as extended by the Defense Bases Act of August 16, 1941 (55 Stat. 622, 42 U. S. C. 1651, *et seq.*), applied to injuries suffered by a workman engaged in purely land activities. The First Circuit's obiter, quoted by petitioner, was not concerned with fringe situations.

[25] It is interesting to compare the liberal approach of Judge Soper who wrote the opinion for the Court of Appeals for the Fourth Circuit in the cases cited in the text with his opinion in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U. S. 639, relied on by petitioner as in conflict with the decision below (Pet. Br., pp. 11–12).

plainly is not based on the mere physical location of the structure.[18]

The rationale of these cases, i. e., that a dock, being an aid to land commerce, is to be regarded constructively as "land" for the purpose of delineating admiralty jurisdiction, has also been applied to resolve the confused situation presented by *Smith & Son* v. *Taylor*, 276 U. S. 179. There, a longshoreman, engaged in unloading a vessel was standing on a stage, which projected a few feet out over navigable waters, when he was struck by a sling loaded with cargo, thrown in the water, and drowned. Although the stage projected over navigable waters and the longshoreman was drowned in navigable waters, the Court ruled that the stage was an extension of the dock, which in turn was land. Since the impact occurred on the stage, i. e., constructive "land," the Court concluded that the injury was not within admiralty jurisdiction. 276 U. S. at 181–182.[19]

[18] In *The Admiral Peoples*, 295 U. S. 649, where a passenger tripped off the end of a gangplank and fell onto the dock, thereby incurring injuries, this Court, in holding that the injury was within admiralty jurisdiction, enlarged on the doctrine that a dock is constructively land by holding that the gangplank "was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it projected over the land. Thus, while the libelant was on the gangplank she had not yet left the vessel * * *." (295 U. S. at 651–652.)

[19] Consistently with this ruling, the Court in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, held to be within admiralty jurisdiction a suit to recover for injuries suffered by a

Just as in the case of docks and wharves, there is no question that the abutments and piers of bridges are physically located in navigable waters. This Court has held, however, that damage by a ship to the abutments of bridges is also nonmaritime in nature. *Martin* v. *West*, 222 U. S. 191; *The Troy*, 208 U. S. 321; cf. *Richardson* v. *Harmon*, 222 U. S. 96, 100–101. This result, which again is based on the ground that "[a]s the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was nonmaritime" (*Martin* v. *West*, *sup a*, at 197; see also *Cleveland Terminal and Valley Railroad* v. *Cleveland S. S. Co.*, *supra*, at 320–321) patently is not rested on the physical location test, but, on the contrary, gives virtually conclusive weight to the fact that the structures are tied in with land—and not maritime—commerce.

This criterion—whether the structure involved was concerned with activities on land or navigable waters—rather than that of physical location alone, has likewise been determinative of admiralty jurisdiction over damages to beacons, which, while located in navigable waters, are physically attached to land. In *The Blackheath*, 195 U. S. 361, which involved such a situation, this Court held the damage to be cognizable

longshoreman who, while working on the deck of a vessel, was struck by a swinging hoist and precipitated upon the wharf where he suffered injuries.

in admiralty, stating in an opinion by Mr. Justice Holmes (195 U. S. at 367):

> * * * It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea.[20]

And in *The Raithmoor*, 241 U. S. 166, which involved damage to an incompleted beacon under construction and the temporary platform used in connection with this construction, this Court commented in holding that the damage to both was under admiralty jurisdiction (241 U. S. at 176):

> * * * The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation * * *.

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[20] The dissent in *The Blackheath* claimed that the result reached by the Court was to overrule *The Plymouth*, cited, *supra*, p. 31. However, in *Cleveland Terminal R. R.* v. *Steamship Co.*, *supra*, p. 31, the Court held that *The Blackheath* had not overruled the prior decisions and distinguished *The Blackheath* on its facts, pointing out that "[t]he damage was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function" (208 U. S. at 320).

By thus brushing aside the beacon's relation to land as only technical, the Court again made it clear that the structure's purpose rather than its physical location is, in appropriate circumstances, to be accorded greater weight in determining jurisdiction in admiralty.

Turning to a situation closely analogous to that here involved, i. e., that of a graven dry dock, it will be recalled that a graven dry dock is dug into land and is permanently affixed thereto. *Supra*, pp. 11–12. Moreover, in order to repair a ship in a graven dry dock, it is necessary to float the vessel into the dry dock, and then to pump out the water. While the vessel is being repaired, it typically is completely out of water and is supported by the necessary props. Despite these circumstances, there is no question—and petitioner has conceded (Pet. Br., pp. 23, 28)—that a graven dry dock in which a vessel is repaired is not "land," and consequently injuries suffered in the course of these repairs are cognizable in admiralty. *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171; *The Anglo-Patagonian*, 235 Fed. 92 (C. A. 4), certiorari denied *sub nom. Lord* v. *Ledwitch*, 242 U. S. 636; *Butler* v. *Robins Dry Dock & Repair Co.*, 240 N. Y. 23; *O'Hara's Case*, 248 Mass. 31.

The rationale for the conclusion that although a graven dry dock is physically on land admiralty law controls repairs therein to a vessel appears in *The Robert W. Parsons*, 191 U. S. 17. In that

case, this Court, rejecting the claim that since the repairs were performed on land the contract was nonmaritime in nature, stated (191 U. S. at 33–34):

> * * * A dock is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks. A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or standing, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. Had the vessel been hauled up by ways upon the land and there repaired a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this

proposition and it is believed none such exist.

Although *The Robert W. Parsons* involved a contract, the Court's holding in that case has been held to be fully controlling in cases involving torts. See e. g., *Gonsalves* v. *Morse Dry Dock Co., supra,* at 172; *The Anglo-Patagonian, supra,* at 93–94; *Butler* v. *Robins Dry Dock & Repair Co., supra,* at 26–27; *O'Hara's Case, supra,* at 38; cf. *The Steamship Jefferson,* 215 U. S. 130, 142–143. As stated in *Butler* v. *Robins Dry Dock & Repair Co.* (240 N. Y. at 26–27):

> "* * * The contention * * * is that a graven dock such as the one involved in this case is part of the land and that, therefore, when a vessel rests in such a dock from which all of the water has been drawn it is really on land and that an accident happening to a person then on the vessel and certainly to one standing on the bottom of the dock itself is not a maritime tort. We think the decisions of the Supreme Court hold the other way. We think that for the purposes of disposition of such a question as this and also somewhat as a matter of policy lest admiralty law otherwise might be robbed too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters even though the water has been temporarily withdrawn. * * *
>
> We do not fail to note the contention of respondent's counsel that the cases of

> *Parsons* and *Jefferson Steamship* (*supra*) were concerned with the decision of other questions than those arising from a tort. That of course is true. Nevertheless it seems to us that the opinions in those cases discussed from a general standpoint the question whether a ship resting in such a dock as the present one was in navigable waters or on land and that they become authoritative on the present question.

This discussion makes it clear that admiralty jurisdiction attaches to the claim of a workman injured while repairing a vessel on a marine railway. As already shown *supra*, pp. 4, 11–12, a marine railway, although attached to land, is physically connected with navigable waters and since its function is that of repairing of ships it is immediately concerned with maritime commerce. Accordingly, since a marine railway has no relation to activities on land and is a part of land only in the technical sense that it is physically attached thereto, the reasoning supporting the conclusion that docks and bridge abutments are extensions of land, and hence are constructively to be regarded as "land" for the purpose of determining jurisdiction, fully justifies the contrary conclusion here that a marine railway is an extension of navigable waters and therefore constructively "navigable waters" within the jurisdiction of admiralty.

Moreover, a marine railway is indistinguishable for purposes of jurisdiction from a graven dry

dock. Both are physically attached to land, both are connected with navigable waters, and both serve the same function, i. e., the repair of vessels engaged in maritime commerce.[a] Indeed, the ground of this Court's holding in *The Robert W. Parsons* that graven dry docks are to be considered "navigable waters"—that the contrary holding "would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs" (191 U. S. at 34)—would, in the absence of the Court's express reservation in that case (*supra*, p. 36), be fully applicable to marine railways, for marine railways constitute the larger percentage of the structures commonly known as dry docks in the United States. *Supra*, p. 21.

And even the doubt manifested in the reservation in the *Parsons* case was resolved in favor of the identity, for the purpose of determining jurisdiction, of marine railways with graven dry docks in *Northern Pacific Steamship Co.* v. *Hall Bros. Co.*, 249 U. S. 119. In that case, which involved repairs to a vessel on a marine railway, the Court expressly held (249 U. S. at 128):

> * * * In *The Planter* (*Peyroux* v. *Howard*), 7 Pet. 324, 327, 341, the vessel, requiring repairs below the water line as

[a] The distinction suggested by petitioner, that a graven dry dock is not "land" because it is below the high water mark (Pet. Br. 28), is not supported by any of the authoritative cases.

> well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

In these circumstances, a marine railway is no more "land" than is a graven dry dock, and just as injuries suffered by workmen in a graven dry dock are within admiralty jurisdiction (see cases cited, *supra*, pp. 12, 35), so also are similar injuries suffered while repairing a vessel on a marine railway cognizable in admiralty.[22] Consequently, state law may not validly provide recovery through workmen's compensation proceedings, under the *Jensen* line of decision on

[22] In *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), where the stern of the vessel being repaired on the marine railway was partially submerged in navigable waters at high tide, the Ninth Circuit deemed it unnecessary to decide whether federal jurisdiction might be tied to that fortuitous circumstance. Compare *The Raithmoor*, 241 U. S. 166, 176.

the exclusiveness of admiralty jurisdiction (see, e. g., *Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Washington* v. *Dawson & Company*, 264 U. S. 219; *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449), a line expressly accepted by this Court for the purpose of construing the Longshoremen's Act. *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250; *Davis* v. *Department of Labor*, 317 U. S. 249, 256 (see *infra*, pp. 42–43).

2. *The doctrine of Davis* v. *Department of Labor, 317 U. S. 249, requires affirmance of the Deputy Commissioner's awards.* We have shown *supra*, pp. 27–41, that the instant case is clearly within admiralty jurisdiction and the Longshoremen's Act, and consequently there is no occasion to reach the question as to the applicability of the doctrine of *Davis* v. *Department of Labor*, 317 U. S. 249. However, even assuming that the fact that the marine railway is located on land is to be regarded as sufficient to permit the application of state law, it does not follow that the Deputy Commissioner's awards should be upset, for, at the very least, the instant case is within the "twilight zone" recognized by this Court in *Davis* v. *Department of Labor*, 317 U. S. 249, 256, and there is no "apparent error" (317 U. S. at 257) in the Deputy Commissioner's awards so as to warrant their rejection.

(a) Petitioner urges that reversal of the awards is required by the *Davis* case. According to petitioner, the *Davis* case holds that the Long-

shoremen's Act provides protection only where the injury is clearly within admiralty jurisdiction and, further, that even then the Act may be applied solely in those situations where state law cannot possibly apply. Thus, under petitioner's construction, the effect of the *Davis* case is to emphasize and enlarge the state law exception in Section 3 (a) of the Longshoremen's Act.

But the thrust of the *Davis* ruling was certainly not to enlarge the state law exception, and thereby merely move the area of confusion to a new "undefined and undefinable" (317 U. S. at 255) line of demarcation between state and federal jurisdiction—which would be the result under petitioner's reading. Even prior to *Davis*, this Court in *Parker* v. *Motor Boat Sales*, 314 U. S. 244, ruled that this exception in the Act was not to be enlarged beyond the limits set by the line of cases beginning with *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. In *Davis*, the Court went further and laid down a rule for avoiding the sinuosities of the *Jensen* doctrine, instead of petrifying them as petitioner would do. The purpose of the *Davis* rule is to mitigate the hardships to which injured workmen had been subjected by the concurrent system of state and federal compensation statutes established as a result of the *Jensen* principle. The Court recognized that the confusion resulting from the incorporation of the *Jensen* doctrine into this combined system of state and federal law made it frequently

impossible to determine, prior to the institution of litigation, whether the state or the federal law was applicable, with the result that an "injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere" (317 U. S. at 254). It was to protect the workman against the pitfalls lurking in the "twilight zone" (at p. 256), thereby fostering "the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts such as the one before us, which aims at 'sure and certain relief for workmen'" (p. 254), that the Court announced the *Davis* principle and held that, since the workman had applied for compensation under the Washington statute, he should receive compensation thereunder.

The achievement of the objective stated in the *Davis* case is possible only if the doctrine applies to awards under federal law as well as to state awards, for only in that way is the injured workman accorded full protection against the *Jensen* confusion. Where an award has been made under the federal Act, it is not now to be measured, if in the intermediate zone, by the full measure of the jurisdiction left to the states under the later refinements of the *Jensen* principle (see, e. g.,

Grant Smith-Porter Co. v. *Rohde*, 257 U. S. 469; *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59) or by the standard the court would apply if it were free of *Jensen*. As stated in *De Bardeleben Corp.* v. *Henderson*, 142 F. 2d 481, 483, 484 (C. A. 5):

> * * * Congress intended the compensation act to have a coverage coextensive with the limits of its authority and * * * the provision "if recovery * * * may not validly be provided by State law" was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. * * *
>
> * * * In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. In short, the Federal Compensation Law now in effect, the judi-

> cial tergiversations which went on before its passage no longer have point. * * *

See, also, *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802 (C. A. 5); *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949 (C. A. 4); *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4). In short, the *Davis* case is, and has been regarded as, another decision of the Court in the trend toward "a more restrictive interpretation of the exception in the Longshoremen's act and an enlarged view of its [i. e., the Act's] scope." *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C. A. 4); see also *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4); *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 483–484 (C. A. 5); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 412–415 (C. A. 9).

Petitioner's claim does not derive any support from the fact that, until now, this Court's application of the *Davis* doctrine has resulted in permitting state law to apply in situations where, prior to *Davis*, state law might very well have been inapplicable. See *Moores's Case*, 323 Mass. 162, 167, affirmed *sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874; *Baskin* v. *Industrial Accident Commission*, 89 Cal. App. 2d 632, reversed, 338 U. S. 854; 97 Cal. App. 2d 257, affirmed, 340 U. S. 886. That result has come about, not because the Court has regarded *Davis* as applying solely

And the *Davis* case has been construed as requiring the affirmance of an award under the Longshoremen's Act even where compensation had been awarded under state law by the appropriate state agency (*Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne, supra,* at 971; *Western Boat Bldg. Co.* v. *O'Leary, supra,* at 411–412), a result not involved here since the payments made by petitioner to the deceased's widow and minor children under Louisiana law were concededly voluntary and not pursuant to an award by an agency of the State (R. 5).*

(b) Once it is recognized that the *Davis* doctrine applies to awards under the Longshoremen's Act which are within the "twilight zone", there clearly is no basis for rejecting the Deputy Commissioner's awards, assuming that the injuries here are not exclusively within federal jurisdiction. The maritime aspects of the instant

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* These payments were credited against the Deputy Commissioner's award (R. 12). *Supra*, p. 5. Acceptance of these payments by the claimants does not estop them from proceeding under the Longshoremen's Act. See *Massachusetts Bonding & Insurance Co.* v. *Lawson*, 149 F. 2d 853 (C. A. 5); *Kibadeaux* v. *Standard Dredging Co.*, 81 F. 2d 670 (C. A. 5), certiorari denied, 299 U. S. 549; *Gahagan Const. Corp.* v. *Armao*, 165 F. 2d 301, 307 (C. A. 1); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411–412 (C. A. 9); cf. *Lawson* v. *Standard Dredging Co.*, 134 F. 2d 771 (C. A. 5); *Hoffman* v. *N. Y., N. H. & H. R. Co.*, 74 F. 2d 227 (C. A. 2), certiorari denied, 294 U. S. 715; *United States Fidelity & Guaranty Co.* v. *Lawson*, 15 F. Supp. 116 (S. D. Ga.); *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F. 2d 265 (N. D. Ill.).

situation, being virtually 100%, are far more substantial than the non-maritime phases involved in *Davis*, as well as in the cases in which the Court has applied *Davis* (*Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, 340 U. S. 886), and hence there is no "apparent error" calling for rejection of the awards (see 317 U. S. at 256–7).

In *Davis*, where the structural steel worker who had been working on a barge fell into navigable waters and drowned, the Court reversed the Supreme Court of the State of Washington (which had held the death not covered by its state compensation act), apparently on the ground that the fact that the work being done related to the dismantling of a draw bridge, and consequently contained both maritime and nonmaritime aspects, operated to bring the situation within the intermediate zone. *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, affirming *Moores's Case*, 323 Mass. 162, involved injury to a rigger, whose work in connection with repairing a vessel in a floating dry dock tied to a pier was principally on the pier. Although the Supreme Judicial Court of Massachusetts plainly regarded the nonmaritime elements as insubstantial (it expressly stated that the decisions of this Court prior to *Davis* would have required it to dismiss the claim under the state compensation law (323 Mass. at 167)),

it nevertheless held that *Davis* required affirmance of the award of the state compensation agency. This Court agreed. And in *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, 340 U. S. 886, which involved injury to a helper engaged in carrying planks from one hold to another of a vessel under repair, the California court initially affirmed the Commission's dismissal of the claim on the authority of decisions of this Court rendered prior to *Davis* (89 Cal. App. 2d 632), and only upon remand by this Court in the light of *Davis* and *Bethlehem Steel Co.* v. *Moores* (335 U. S. 854), did the California court direct the compensation commission to entertain the claim (97 Cal. App. 2d 257), a holding which this Court affirmed (340 U. S. 886).

In the instant case, not only is the situation predominantly, if not completely, maritime in nature (see *supra*, pp. 16–25, 35–41), but the Deputy Commissioner's awards are in accord with decisions of this Court in closely analogous situations (*supra*, pp. 35–41), as well as with Courts of Appeals' rulings on this very question (*supra*, p. 13). Plainly, therefore, even if federal jurisdiction is not exclusively applicable, there is no "apparent error" and hence no basis, under the *Davis* doctrine, for rejecting the awards of the Deputy Commissioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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